

RENA MAZIKANA
and
FUNGAI CHINANGA
and
KILLIANA MUKANDI
and
JACQUELINE MULENGA
and
LOVENESS MUYEYE
and
EMILY KASHENJE
and
NYENGETERAI ZIVANAI
and
MOLLEN MASHUTA
and
KUDZAI MOYANA
and
RANGANAI CHIKWENYA
and
NYARADZO MUGANIWA
and
VIMBAI CHIRIPANYANGA
and
RITHAR CHIKOMBA
and
MERCY MUSKWE
versus
METZIM ENTRPRISES (PVT) LTD
and
THE MESSENGER OF COURT HARARE (NO)

HIGH COURT OF ZIMBABWE
MANZUNZU J
HARARE, 12 & 25 October 2018

Opposed Urgent Chamber application

A M N Makoni, for the applicants
T M Chara, for the 1st respondent

MANZUNZU J: The 14 applicants filed individual urgent applications against the same respondents. At the commencement of the hearing of these applications Mr Makoni who represented all the applicants applied for the consolidation of the matters so that the court can have a single hearing. The application for consolidation was not opposed. I allowed the consolidation of the 14 cases for the following reasons:

1. All the applications are founded on the same cause of action.
2. Applications are premised on more or less the same facts
3. The prayer sought by the applicants was basically the same
4. The respondents were the same in all the cases
5. All applicants were represented by the same legal practitioner
6. The first respondent was represented by the same legal practitioner
7. Overall, the balance of convenience favoured consolidation and it was expedient to do so.

The 14 applicants have been put in the order of the numerical order of their case numbers and for the purposes of this ruling shall be referred to as first applicant up to 14th applicant.

They all prayed for a provisional order in the following terms:

“TERMS OF FINAL ORDER SOUGHT

That you show cause to this Honourable Court why a Final Order should not be made in the following terms:

IT IS DECLARED THAT:

(d) The eviction of the applicant as an occupier under an ejection order issued against Memory Mazana under matter 17206/18, to which proceedings applicant was not cited nor was a party to (without a court order specifically naming applicant as a person to be evicted), was unlawful self help and violation of Applicant’s constitutional right to be heard on the issue of the eviction by a court of competent jurisdiction

(e) the 2nd respondent’s decision, made during eviction, that applicant occupied the shop through Memory Mazana was incompetent and unlawful as the 2nd respondent has no authority or jurisdiction to make judicial decisions

(f) failure by the 2nd respondent to serve applicant with a notice of the intended eviction as was required by law, was wrongful and unlawful, rendering the eviction null and void *ab intio*.

(g) failure by the 2nd respondent to serve the applicant with ejection process on the day of her eviction as was required by law was wrongful and unlawful, rendering the eviction null and void *ab intio*.

IT IS ORDERED THAT:

1. That the 1st and 2nd respondent’s, all their employees and assignees be and are hereby interdicted from interfering whatsoever with, disrupt or terminate Applicant’s peaceful

- and undisturbed possession of table no 3, 107 Mbuya Nehanda Street, Harare, without the authority of a Court Order.
2. That the 1st and 2nd respondent's jointly and severally shall pay the costs of suit on an attorney-client scale jointly and severally, payment by one absolving the other.

INTERIM RELIEF GRANTED

1. That the 1st and 2nd Respondents be and are hereby ordered to immediately restore to Applicant, peaceful and undisturbed occupation of table no. 15, shop no. 3, 107 Mbuya Nehanda Street, Harare
2. That pending finalisation of this matter, the first and second respondents, and all of 1st and 2nd respondent's employees and assignees, be and are hereby interdicted from interfering with applicant's free possession and control of table no 15 shop no. 3 107 Mbuya Nehanda Street, Harare.
3. That the 1st and 2nd Respondents shall jointly and severally pay the costs of suit on an Attorney-client scale

SERVICE OF PROVISIONAL ORDER

Leave is hereby granted for this order to be served by Applicant's Legal Practitioners on 1st and 2nd respondents or their legal practitioners"

This is the order sought by all the applicants with the only difference being in table numbers.

The first respondent filed a notice of opposition with Ms Chara representing it. The second respondent, who is the messenger of court did not file any papers in a situation where he ought to have filed in order to explain certain serious and damaging allegations against him in the conduct of his duties. Messengers of court, just like the Master of the High Court, have a duty to file reports where there are compelling reasons justifying that they must do so. They cannot hide behind the principle of neutrality when their professional conduct and integrity is put at stake.

Common cause

Some of the facts of this application are common cause: I will outline them hereunder:

1. All the applicants were in the business of buying and selling clothes, commonly referred to as a flea market occupying individual tables at Shop No. 3, 107 Mbuya Nehanda Street, Harare. They started this business at varying times ranging from September 2013 to as recent as September 2018.
2. Shop No. 3, 107 Mbuya Nehanda (hereafter referred to as "Shop No. 3") belongs to the first respondent.

3. The applicants say they entered into an oral lease agreement with Lanass Clothing to occupy certain tables at a specified rental per month. Lanass Clothing is a trade name for Neosys (Pvt) Ltd.
4. On 1 October 2018 the Sheriff evicted all the applicants from Shop No 3 on the strength of a writ of ejectment from the Magistrate's Court under case No. 17206/18. The parties to that writ are Metzim Enterprises (Pvt) Ltd as the plaintiff, *in casu* the first respondent, and one Memory Mazana as the defendant. The relevant part of the writ being an instruction to the Messenger of Court reads, "...you are required and directed to eject the said Memory Mazana and all persons occupying the said shop through her as the lease holder..."

The leaseholder to Shop No. 3 at the time of eviction was Memory Mazana.

5. The writ is derived from the Magistrate's Court order of 7 September 2018 which reads in part; "Defendant (Memory Mazana) and or all those claiming occupation through her at Shop Number 3, 107 Mbuya Nehanda Street, Harare be evicted."
6. The act of eviction is the one which brought about these applications in which the applicants seek a spoliation order and interdict.
7. It is also common cause that there is pending litigation in the Magistrates' Court in which Memory Mazana is suing these applicants for eviction under case No. 11353/18.
8. There has also been various communication between the applicants' legal practitioners on one hand with Neosys (Pvt) Ltd, and the legal practitioners for Memory Mazana and those of the first respondent and the second respondent. What this culminates to is that not all was well. There has been a brewing dispute between the applicants and the first respondent.

I will identify the disputed facts between the parties within the context of the law.

Spoliation order (*Mandament van Spolie*)

The requirements of a spoliation order are well settled: The applicant has the onus to show that:

1. he/she was in peaceful and undisturbed possession of the property.
2. there was unlawful deprivation of possession i.e deprivation without consent of the applicant or without due legal process.

This is a remedy meant to discourage self-help.

Peaceful and undisturbed possession

The applicants must allege and prove that they were in peaceful and undisturbed possession of the property. See *Kgosana v Otto* 1991 (2) SA 113. The applicants say they entered into a verbal lease agreement with Lanas Clothing represented by one Moosa Suleman. None of the applicants spelt out on paper the material terms of the agreement apart from the fact that they paid rent. Some old receipts were appended to their founding affidavits which are scripted with the names Neosys (Pvt) Ltd t/a Lanas Clothing. The duration of their oral lease agreement was unknown until Mr *Makoni* in oral submissions said it was indefinite.

They claim their occupation was peaceful and undisturbed. They denied that their right of occupation was through one Memory Mazana. They claimed that they were statutory tenants without elaboration as to how they acquired that status. They further alleged were evicted without notice.

In opposition the first respondent said its approach to the leasing of its shop was the one lease holder approach. The one lessee will sign a lease agreement with the respondent. The applicants would be subtenants reporting and paying rent to the lease holder. This explains why the applicants do not have any lease agreement with the first respondent. It was explained that Lanas Clothing through which the applicants used to pay their rent was a lease holder before such lease was terminated and eventually Memory Mazana became the new lease holder. The first respondent said the applicants were advised through a notice with an instruction that they were to pay their individual rentals through Memory Mazana. But for reasons unknown to the first respondent the applicants tore the notice and refused to recognise Memory Mazana as the new lease holder. This is when problems started with the exchange of letters and litigation by Memory Mazana in an attempt to evict them.

The issue is, was the occupation peaceful and undisturbed? *Oxford Learners' Dictionary* defines the word “peaceful” as calm, quiet. Other dictionaries define peaceful as “free from disturbance.” To disturb is to “break the quiet, calm peace or order” per Oxford dictionary. It follows therefore that if something is undisturbed it will be quiet, calm, peaceful and orderly. For the purposes of obtaining a spoliation order, it is not sufficient for a party to merely prove occupation. The occupation must be peaceful and undisturbed. Was this the kind of occupation the

applicants enjoyed before their eviction? In opposition the first respondent says applicants were not in peaceful and undisturbed possession that is if one refers to the letters and court actions attached to the applications.

On 27 June 2018 the applicants' legal practitioners wrote a letter to Neosys (Pvt) Ltd t/a Lana Clothing complaining against its refusal to accept rent from applicants following an instruction that such rent be paid to Memory Mazana. In the same letter the applicants expressed their unwillingness to work with Memory Mazana whom they alleged had issued summons to evict them. There was also a follow up letter of 27 June 2018 which got a response on 29 June 2018 from Messrs Machaya & Associates. In the response Memory Mazana was said to be their client who, as the leaseholder, was entitled to receive the rentals.

On 13 July 2018 another letter came from Messrs Machaya & Associates saying the applicants were given 3 months' notice to vacate by 15 July 2018. The letter further explained the existence of the court action to evict them and alleged that applicants were in unlawful occupation of the shop. In their plea to case No. 11353/18, copy of which applicants attached as an annexure, the applicants referred to a number of cases still pending between them and Memory Mazana. The correspondence which exhibited conflicts between the parties continued even after the eviction.

I am unable to hold that the applicant's occupation was peaceful and undisturbed.

Unlawful deprivation of possession

The applicant's position is that while they were evicted by the Messenger of Court they allege such eviction was unlawful. Their reason for saying so was that:

- (a) The court order and writ of ejectment used by the Messenger of Court did not cite them as parties
- (b) They denied that they fell within the phrase "all those claiming occupation through her". They deny they were occupying the shop through Memory Mazana.
- (c) That they were not given notice of their eviction.

The first respondent said had no contractual relationship or otherwise with the applicants. It was said they were subtenants to Lanas Clothing but when the lease agreement with Lanas Clothing came to an end they had the option to continue as subtenants with the new lease holder Memory Mazana which offer they refused. As far as the first respondent is concerned if they continued in occupation without any agreement with Memory Mazana then that occupation was

illegal. It was more so because they were not paying any rent. The only assumption the first respondent had was that if they were occupiers in the building they could only be through the lease Holder.

Memory Mazana confirmed the respondents' position and attached a lease agreement with the first respondent which commenced on 15 April 2018. The applicants claim they ought to have been cited in the court papers but the respondent only knew the lease holder and anyone else who occupied the shop could only do so through the lease holder. Applicants knew of the impending eviction when a notice was served on them on 26 September 2018 by the Messenger of Court. Even if no notice was served on them that does not nullify the process – See Order 26 Rule 4 A (2) of the Rules of the Magistrates Court.

The messenger of court used a writ of ejectment to evict the applicants. The question is was the ejectment unlawful. It has been argued for the applicants that it was unlawful for reasons already stated.

As clearly stated Memory Mazana was a leaseholder that is not disputed. If applicants remained in the shop the presumption was that it was through her. Otherwise applicants knew that the lease agreement between Lanas Clothing and first respondent had been terminated. They refused to recognise the new lease holder and no reason was given yet they continued with occupation. They cannot cry foul when they are evicted through the lease holder. They cannot hide behind a technicality that their occupation was not through Memory Mazana.

They created that situation to their advantage and cannot be seen to benefit from it. Their eviction through a warrant against the lease holder was proper. They were therefore lawfully evicted through a court order.

Interdict

It shall not be necessary to go into the full details on the relief of an interdict save to say their evidence fell short of proving the 4 elements of an interim interdict. I will list them hereunder

1. A prima facie right

Applicant could not establish a *prima facie* right. Their oral agreement terminated with the termination of the lease agreement between Lanas Clothing and first respondent.

2. Reasonable apprehension of irreparable harm

Applicants could not show any apprehension of irreparable harm other than economic hardships.

3. No alternative satisfactory remedy

Applicants have not shown absence of any alternative satisfactory remedy.

4. Balance of Convenience

The balance of convenience favour the first respondent in that there is now a new leaseholder who is said to have started renovations of the shop. Restoration will prove to be impossible.

In the result, this application cannot succeed.

Accordingly,

1. The application is dismissed.
2. Applicants to pay 1st respondent's costs jointly and severally the one paying the other to be absolved.

Makoni legal Practice, Applicants' legal practitioners
Chara & Associates, 1st respondent's legal practitioners