

**ARNOLD MAHONYE**

**Versus**

**CURE CHEM OVERSEAS (PVT) LTD**

IN THE HIGH COURT OF ZIMBABWE  
NDOU J  
BULAWAYO 13 AND 20 SEPTEMBER 2007

*J Sibanda* for the applicant  
*H Shenje* for the respondent

Urgent Chamber Application

**NDOU J:** The applicant seeks a spoliation order. The background facts of the matter are the following. The applicant was in 2003, employed by the respondent as its Bulawayo Branch Manager. In November 2006, a meeting was held at Norton of all the respondent's employees. The meeting was also attended by delegates in respondent's employ from Zambia and South Africa. The greater portion of the agenda of this meeting is not relevant to these proceedings. What is relevant is the allegation by the applicant that it was at that meeting that the Managing Director of the respondent, A Chand, made a public announcement that in appreciation of his loyal, distinguished and meritorious service to the respondent, the respondent had seen it fit to import a motor vehicle as a gift to the applicant for use by his wife. He states that there is no doubt in his mind that this public announcement was made public knowledge as a way to encourage the other employees present to work as hard as he had done for the respondent. He states that this announcement drew great applause from the delegates who congratulated him on his fortune. This is vehemently denied by the respondent. The vehicle in question was purchased and the applicant collected it from South Africa. The respondent paid all the importation duties and expenses for the vehicle. This was in December 2006. The vehicle is

registered in the name of the respondent. In June 2007 the parties entered into discussions and it was agreed that the applicant tenders his resignation from the respondent's employ. The applicant duly tendered the resignation which was effective from June to August 2007. On 10 July 2007 the applicant received a letter from the respondent demanding the return to the company of certain company assets including the motor vehicle subject matter of these proceedings, i.e. the Toyota Soluna registration number AAQ 7493. The applicant refused with the vehicle and stated that it was given to him as a gift in the above-mentioned circumstances. The respondent laid a charge against the applicant of car theft with the Criminal Investigations Department of the ZR Police, Bulawayo. The applicant was summoned by Inspector Maphosa. He gave his version and the latter advised that the matter was a civil one and advised the parties accordingly. The respondent was not happy with the turn of events and took the matter up with Harare police. On 18 August 2007 the applicant was picked up by two Harare police details. He was ordered to drive the vehicle in question to Harare. The vehicle was handed over to the respondent and the applicant was placed on remand at Harare Magistrates' Court on 21 August 2007. He was charged with the offence of using a motor vehicle without the owner's authority and remanded to 15 October 2007 on his own recognisances. Before his arrest, the applicant had already issued and served summons against the respondent for a declaration to be made that the said vehicle belongs to him. The summons was issued out on 16 July 2007 and served on the respondent on 1 August 2007. The respondent entered appearance to defend on 8 August 2007. In other words, the respondent sought police intervention when the matter was already seized with this court. The applicant did not cite the persons who deprived him of the

possession i.e. Zimbabwe Republic Police. It was the Zimbabwe Republic Police who took the vehicle and later gave it to the respondent. The applicant is barking at the wrong tree, so to speak. It is trite that the purpose of the *mandament van spolie* is to restore unlawfully deprived possession *ante omnia* to the possessor, in order to prevent people from taking the law into their own hands – *Nino Bonino v de Lange* 1906 TS 120; *Buck v Buck* 1973 (2) RLR 315 (GD); *Chisveto v Minister of Local Government and Town Planning* 1984 (1) ZLR 248 at 250B-D and *Neinaber v Stuckery* 1946 AD 1049. In such spoliation proceedings all that applicant needs to prove is:

- (1) that he was in peaceful and undisturbed possession of the property; and
- (2) that he was unlawfully deprived of such possession - *Van t'Hoff v Van t'Hoff and Ors* 1988 (1) 294 (H) at 296B-C; *Davis v Davis* 1990 (2) ZLR 136 (HC) at 141B-C and *Geza v Assistant Inspector Khumalo & Anor* 2002(2) ZLR 144(H).

There is no doubt from the papers of both parties that the applicant has fulfilled

requirement (1). The applicant was in peaceful and undisturbed possession of the vehicle in question. The only issue here is requirement (2), i.e. whether or not the applicant was unlawfully deprived of such possession. Is what the Harare police did illicit? There is a problem in this regard which the applicant has created by not citing the police. In terms of section 49(a) the Criminal Procedure and Evidence Act [Chapter 9:07] the Police are empowered to “seize any article which is concerned in or is on reasonable grounds believed to be concerned in the commission of an offence, whether within Zimbabwe ...” And in section 58(c) “a police officer who seizes any

article referred to in section forty-nine ... shall, if the article is not disposed of or delivered in terms of paragraph (a) or (b), give it a distinctive identification mark or retain it in police custody or make such other arrangements with regard to the custody thereof as the circumstances may require” (emphasis added). The police who arrested the applicant and took the vehicle have this wide discretion. If they exercised this discretion in an illicit fashion it is them who should account and not the respondent. In the circumstances it was crucial that they be cited. The application should fail on account of failure to cite the police. Before I conclude I think I should also deal with the point raised by the applicant concerning his appearance in Harare Magistrates’ Court. I do not think the remand proceedings are in violation of section 56 of the Magistrates’ Court Act as he alleges. Section 56 would only be violated if the actual trial takes place in Harare Magistrates’ Court, without the Attorney General’s authorisation. Be that as it may, I do not have to determine the issue in this application.

Accordingly, the application is dismissed with costs.

*Job Sibanda & Associates*, applicant’s legal practitioners

*F G Gijima & Associates c/o Shenje & Co*, respondent’s legal practitioners