

BEKITHEMBA NYATHI

And

**MOVEMENT FOR DEMOCRATIC CHANGE
(BULAWAYO PROVINCIAL YOUTH ASSEMBLY)**

And

MOVEMENT FOR DEMOCRATIC CHANGE

Versus

**THE OFFICER-IN-CHARGE
(BULAWAYO CENTRAL POLICE STATION)**

And

THE COMMISSIONER GENERAL OF POLICE

And

THE CO-MINISTERS OF HOME AFFAIRS

IN THE HIGH COURT OF ZIMBABWE
NDOU J
BULAWAYO 23 & 26 JANUARY 2012

S. Mguni with K. Ngwenya for applicants

L. Musika for respondents

Urgent Chamber Application

NDOU J: The applicants seek an order for spoliation in that;

“1st respondent and/or his agents or assignees be and are hereby ordered to immediately cause to be released and restore [*sic*] to the applicants the possession and control of eight (8) boxes of fliers, with each box containing five thousand (5 000) copies of two (2) boxes of 3rd applicant’s National Council Resolutions of the 17th of December 2011, with each box containing five thousand (5 000) copies.”

The salient facts of this matter are the following. The 1st applicant is Provincial Chairperson of the 2nd applicant. The 2nd applicant is an organ of the 3rd applicant. The 3rd

applicant is a political party. On 14 January 2012, the 2nd applicant decided to conduct what they term “a peaceful car procession in and around Bulawayo Province in solidarity with 2nd applicant’s national Chairperson one Solomon Madzore and seven (7) others” who are in prison custody at Chikurubi Prison on allegations of murdering a police officer. The car procession was scheduled to start at 1000 hours. It was planned to be preceded by a prayer at 3rd applicant’s provincial offices at number 42 Fort Street, between 2nd and 3rd Avenues. After the prayer session, the members were to be ferried by motor vehicles in a procession of cars with stickers and distributing fliers advocating for the speedy trial of the said Madzore and seven others. The car procession was to start at the 3rd applicant’s provincial offices and move in and around Bulawayo Province and end around 1200 hours at the 3rd applicant’s provincial offices by another prayer session. The 3rd applicant had made transport arrangements to ensure that all district and branch members of the 2nd applicant are ferried from their respective districts and branches and converge at 3rd applicant’s provincial offices for the prayer and subsequent car procession. Members from various district and branches were brought to the provincial offices. However, Mpopoma District members were stopped at a police roadblock before they entered the Central Business Centre next to McKeuten Primary School.

This eventually led to the arrest of the 1st applicant and some of the 2nd applicant’s members and confiscation of the materials subject matter of this application. It is common cause that the applicants did not notify the Zimbabwe Republic Police of the said procession and prayer sessions in terms of section 25 (1)(a) of the Public Order and Security Act [Chapter 11:17] (“the Act”). Further, the fliers they intended to distribute had the following message –

“FREE SOLO MADZORE AND SEVEN OTHER MDC YOUTH NOW!!!

Justice Delayed is Justice Denied

Rebecca Mafikeni, Yvonne Musarurwa, Tungamirai Madzokere, Stanford Maengahama must be freed!!!

Encouraged, Determined and Committed to the struggle for real change ...

Let’s finish it !!!”

The other document contains resolutions of the MDC National Council held at Harvest House on 17 December 2011. These resolutions do not take this matter any further so I will not state them. The issue is whether the applicants have made out a case for spoliation. It is trite that spoliation is any illicit deprivation of another of the right to possession which he has whether in regard to movable or immovable property or even in regard to legal right – *Nino Bonino v de Lange* 1906 TS 120 at 122; *Davis v Davis* 1990 (2) ZLR 136 (H) at 141; *Geza v Khumalo & Anor* 2002 (2) ZLR 144 (H) and *van t’ Hoff v van t’ Hoff & Ors* (1) 1988 (1) ZLR 294 (H)

at 296B-C. *In casu*, the articles were seized by the police when the latter searched them during the arrest for convening a procession or public gathering without notifying the Regulating Authority (the police) as required by section 25(1) of the Act. This failure is an offence under section 25 (5) of the Act. In their founding affidavit the applicants clearly state what amounts to a contravention of section 25 (5). In this case the respondent was not taking the law into his hands. What the 1st respondent did was not illicit as they were empowered by sections 49, 51 and 52 of the Criminal Procedure and Evidence Act [Chapter 9:07] to search and seize articles which are a reasonable grounds believed to be or concerned in the commission of a crime. *In casu*, the applicants in their wisdom embarked on a procession or public gathering without complying with the provisions of section 25(1) of the Act. They, by so doing, committed an offence under section 25(5) of the Act. These documents were going to be distributed in the abovementioned procession. The purpose of the *mandament van spolie* is to preserve law and order and discourage persons from taking the law into their own hands. In this case, the 1st respondent is empowered to act in the manner he did by the above-mentioned statutory provisions. His conduct is not illicit so there is not spoliation.

Accordingly, the application is dismissed with costs.

Messrs Hwalima, Moyo & Associates, applicant's legal practitioners
Civil Division, Attorney General's Officer, respondents' legal practitioners