

STEPHEN MKIWA
versus
MAGRET MUUSHA

HIGH COURT OF ZIMBABWE
MAWADZE J
HARARE, 18, 23, & 24 January 2012

Urgent Chamber Application

N. Mugiya, for applicant
B. Diza, for respondent

MAWADZE J: This is an urgent chamber application for a provisional order whose interim relief sought is couched as follows:

“INTERIM RELIEF GRANTED

Pending the confirmation of the provisional order, it is ordered that:-

- (a) The respondent be and is hereby ordered to release and return to the applicant through his legal practitioners of record, a Land Rover Discovery Tdi Registration No. AAQ 5444 not later than 48 hours from the granting of this order.
- (b) The respondent be and is hereby ordered to release and return to the applicant through its legal practitioners of record, all property listed on paragraph 20 of the applicant’s founding affidavit.
- (c) The respondent and those who may act on her behalf are interdicted from causing threats of whatsoever nature and harassment on the person of the applicant.”

I find the provisions of paragraph (c) above to be vague and incomprehensible. Even if I was to grant the interim relief I would on that basis decline to grant the interim relief sought in paragraph (c).

The terms of the final order are construed as follows:-

“TERMS OF FINAL ORDER SOUGHT

1. The respondent be ordered not to interfere with the applicant’s possession of a Land Rover Tdi vehicle registration number AAQ 5444 and all property listed on paragraph 20 of applicant’s founding affidavit (sic).

2. The respondent and all those who may act through her be barred from intimidating or causing threats to the person of the applicant in any way whatsoever and at any place.
3. The respondent is ordered to pay costs of suit on higher scale.”

BACKGROUND FACTS

The facts giving rise to the application are difficult even to summarise on account of the very different versions by the parties in their respective affidavits.

The parties are only agreed as to how they met and that they are legally married to each other. The applicant has now moved out of the matrimonial house number 16924 Zengeza 3 Chitungwiza and is now residing at No 8 Mukoko Road, Zengeza 1, Chitungwiza. The applicant does not explain the owner of house number 8 Mukoko Road, Zengeza I, Chitungwiza nor did he explain whom he stays with at this house. This became important in view of the fact that the applicant alleges the respondent visited him on 11 January 2012 which is the basis for his complaint, a fact hotly disputed by the respondent. The respondent works at Zengeza 7 Primary School in Chitungwiza. It is not clear what the applicant does but he was unable to attend this hearing as he was said to be away in Sudan.

It is common cause that the parties met each other in early 2011 as the applicant was looking for rented accommodation at the respondent's house number 16924 Zengeza 3 Chitungwiza. The applicant initially left his clothes for safe keeping with the respondent and they began to constantly communicate until they fell in love in April 2011. The applicant then moved on to stay with the respondent and her two children. According to the applicant he moved in with his personal clothes, 21 inch TV set, a two door upright refrigerator, therapeutic bed and computer trolley. According to the respondent, the applicant moved in with all the property mentioned except the fridge and the computer trolley which she says were bought after solemnization of the marriage. Apart from this the parties are not agreed at all as to what transpired thereafter. It is important to outline in detail the contrasting versions of events given by the applicant and the respondent giving rise to this application.

The parties are not even agreed as to circumstances leading to the solemnisation of their marriage. According to the applicant after staying with the respondent few months and in June 2011 the respondent exerted upon him tremendous pressure coercing him to pay the pride price (lobola) but the applicant was reluctant. The applicant said in July 2011 the respondent took her own money and paid her own bride price to her parents to cement a

customary law union between the two! The applicant does not explain how the respondent was able to achieve this feat. On the other hand in her opposing affidavit the respondent alleges that it is the applicant who pressurised her into the marriage saying he wanted to go to his work place in Sudan and would not risk leaving without marrying her as other men would snatch her. In fact the respondent said the applicant said he had only two weeks to solemnise the marriage before leaving for Sudan but she later realised this was a ruse as the applicant did not go to Sudan after marrying her. The respondent's version is corroborated by one Mercy Muramani in her supporting affidavit and she witnessed the marriage between the applicant and the respondent. This is also confirmed by one Venna Chifamba an elder in ZAOGA Church who acted as a go between on behalf of the parties in lobola negotiations and he disputes the applicant's version.

On 7 July 2011 the applicant said the respondent duped him into solemnisation of the marriage under the guise of a surprise party. The applicant said few people were gathered ostensibly for a surprise party for the applicant and to his utter dismay and helplessness a marriage officer had been stealthily brought and the respondent happily announced that the two were to tie the knot and sign the marriage register after taking marriage vows. The applicant said he was virtually snared into the marriage as it were and could not do anything about it. This was dismissed by the respondent as a figment of the applicant's imagination as nothing of that sort happened, in fact the respondent said the applicant pressurised her to solemnise the marriage and a proper marriage ceremony presided over by a marriage officer and witnessed by Mercy Marumani and her husband was held at the matrimonial home. Mercy Marumani in her supporting affidavit said it is the applicant and the respondent who approached her together in June 2011 and requested her and her husband to be witnesses to their civil marriage and that the applicant requested church elders of ZAOGA Church to facilitate solemnisation of the marriage which was done in July 2011 with the applicant's full consent and participation.

As already stated the parties entered into a civil marriage [*Cap 5:11*] on 11 July 2011 and the marriage still subsists. No children have been born out of this union.

The applicant in his founding affidavit stated that within a month of the solemnisation of the marriage they faced serious marital problems as the respondent denied him conjugal rights alleging she was haunted by the spirit of her departed husband and they would always fight for one reason or another. He said towards the christmas holidays in December 2011 the marital relationship had broken down and he was also fed up. Applicant said he was

ordered by the respondent to pack his belongings and leave within 24 hours. His clothes were thrown out of the house hence he left and is now staying at number 8 Mukoko Road in Zengeza 1.

The respondent's version is that what caused the marital problems is that the applicant was cheating on her and would come home in the early hours of the morning. The respondent in her opposing affidavit said the applicant was very abusive and would severely assault her. She said the applicant also caused her to dispose of some property she had acquired with her late husband, that is a fridge, kitchen unit and stove and they shared the cash. She dismissed as totally false that she was haunted by her late husband's spirit but was being tormented by the applicant and that counselling at church did not yield positive results. They however bought a new fridge and the items which are being claimed by applicant in this application as his property forcibly taken away from him. Contrary to the applicant's averements, the respondent said the applicant left the matrimonial house in October 2011 not in December 2011 on his own accord and did not collect all his personal belongings. By then the respondent said she had been persuaded by the applicant to sell a motor vehicle from the previous marriage which motor vehicle the applicant had promised to replace.

The applicant stated that after he moved out of the matrimonial home the respondent started to send unknown people to threaten him including an unidentified uncle of respondent who allegedly works in the Prime Minister's office. He said he was told to pay compensation of about US\$15 000 to the respondent and that when he refused he was told he would be caused to disappear. As a result of these threats he filed for divorce in this court and attached summons issued out of this court on 10 January 2012 wherein the applicant prays for a decree of divorce and an order of costs only. The applicant said the respondent was incensed by the action he took and on 11 January her unnamed uncle threatened the applicant with death for refusing to pay compensation and betraying the respondent. That same day 11 January 2012 late at night he said the respondent in the company of her unnamed uncle and a group of men (whose number is not stated) came to the applicant's residence and demanded US\$15 000 as compensation for divorce. The applicant said he had no such cash. It is this visit, according to the applicant which triggered this application.

The applicant said after he failed to raise the US\$15 000 demanded, the respondent and the men in her company who were driving a Toyota T35 truck forcibly took the following property from his house; Nokia N900 handset, 2 door upright fridge, 21 inch colour TV, therapeutic bed, computer trolley, 2 cover beds, 5 bed sheets, three blankets, 3 monarch

bags full of the applicant's personal clothes. All this property was loaded in the T35 Mazda truck. The applicant said the respondent took his car keys for the motor vehicle Land Rover Discovery number AAQ 5444 and forcibly drove away the motor vehicle. The applicant said he reported the matter to St Marys Police Station but does not specify as when he made the report and to whom. The applicant said he was left only with the clothing he was wearing and the Police who called the respondent and her unnamed uncle were unhelpful as they accepted the unnamed uncle's words that the dispute between the parties was a traditional family dispute to be resolved at family level hence they were dismissed by the Police. The applicant said the respondent demanded to be paid US\$15 000 before she could return the applicant's property and the motor vehicle and threatened to sell the property within 7 days if the applicant failed to comply (which was by 18 January 2012). The applicant said he was surprised to see his motor vehicle on sale at the Unit C junction car sale. He did not disclose the date but the applicant filed this urgent chamber application on 16 January 2012.

The supporting affidavits for Nephias Chiyambuwa who regards the applicant as his uncle and Ishmael Tsaga who claims to be the applicant's landlord of No 8 Mukoko Road Zengeza 1 Chitungwiza filed by the applicant on 20 January 2012 after the initial hearing on 18 January 2012 are unhelpful and no probative value can be placed on them. All what Nephias Chiyambiwa attests to in the supporting affidavit is what he was told by the applicant (see paragraphs 4,5,6,7, 8, 10, 11). In fact Nephias Chiyambiwa did not witness crucial events of the night of 11 January 2012. Ishmael Tsaga proved during the hearing to be untruthful in averements made in his affidavit. It turned out that he lied that he is the applicant's landlord (see para 1). Ishmael Tsaga admitted that house no 8 Mukoko road Zengeza 1 Chitungwiza belongs to the applicant's parents. It also emerged that the applicant's mother, the applicant's son Edward and the applicant's young brother Prince stay at this house. The applicant makes no reference to these people neither does he mention in his affidavit to be a tenant of Ishmael Tsaga. This puts into issue and doubt the truthfulness of all what Ishmael Tsaga said he witnessed on the night of 11 January 2012 at number 8 Mukoko Road, Zengeza I, Chitungwiza as it was disputed that he does not even stay at this house.

The respondent in her opposing affidavit dismissed as false events alleged to have happened on the night of 11 January 2012 at no 8 Mukoko Road Zengeza 1. In fact the respondent denied ever visiting the applicant at his place on the night in question and denied taking the motor vehicle and property alleged. The respondent's version of events is that after the applicant left the matrimonial home in October 2011, she fell seriously ill and was

admitted in the intensive care unit at Southmed Hospital. She had to be operated on and had a miscarriage. She dismissed harassing the applicant in any manner or sending people to harass him. She challenged the applicant to name the so called uncle of the respondent from the Prime Minister's office. She accused the applicant of possessing a super active imaginative mind as he simply fabricated events which never happened.

As regards the property mentioned in para 20 of the applicant's founding affidavit the respondent said save for 5 bed sheets and 3 blankets all the property is at her house as the applicant left the property in the house when he deserted the matrimonial house.

In relation to the Discovery Land Rover motor vehicle the respondent states that the motor vehicle belongs to the applicant but denied that the applicant was keeping the motor vehicle at his work place and only took it to his new residence after separating from the respondent. The respondent said soon after she married the applicant and after selling her car the applicant gave her the Land Rover Discovery motor vehicle to use in July 2011 and that she has been in possession of that motor vehicle since then to date together with the registration book. In fact she said when the applicant left the matrimonial home he did not demand or take the motor vehicle in issue. She said the applicant and the respondent had agreed to dispose of the motor vehicle and buy another motor vehicle for the respondent with part of the proceeds of the sale. The respondent said the applicant's uncle at one stage took the motor vehicle in December 2011 purportedly to find a buyer but returned it to her after failing to secure one. The respondent said the applicant and his uncle visited her at night on 27 December 2011 ostensibly to collect the applicant's clothes but they did not do so as it was late. In fact the respondent said on 8 January 2012 he gave the applicant's uncle the motor vehicle to go to a church function at Mt Darwin and he returned it to her as she was at all material time the custodian of the motor vehicle. The respondent said in fact the applicant made a police report at St Marys Police Station on 29 December 2011 of theft of the same motor vehicle against her which report was recorded on 29 December 2011 at 1125 hours CR10/01/12. The respondent said she had to go with the motor vehicle in issue to the police on 6 January 2012 and explained herself to Assistant Inspector Mubaira and Cst Mukwekwe who allowed her to retain the motor vehicle thus dismissing the false report of theft by the applicant. She denied ever putting the motor vehicle on sale and challenges the applicant to name the agents she had given the motor vehicle.

The respondent's allegations that she was at all material times in possession of the Land Rover Discovery motor vehicle is supported by Venna Chifamba (paragraph 9 and 12

of his supporting affidavit and the respondent's workmate Odrix Mhiji (paragraphs 4,5 and 6 of his supporting affidavit).

The applicant in paragraph 26 and 27 of his founding affidavit summarises the basis of this application as follows;

“26. I am advised which advise I accept that the respondent and her relatives had no right to despoil of my property and attach same as if there are the court of law and the messenger of court themselves. There is no legal justification of the respondent's conduct.

27. I am now leaving in fear of the respondent and her relatives and there is clearly great risk that my property will be disposed of if this matter is not dealt with on an urgent basis”

On the other hand the respondent dismisses the alleged events of 11 January 2012 and denies even visiting the applicant at his residence. According to the respondent the property listed in para 20 of the applicant's founding affidavit has always been in her possession except the 5 bed sheets and 3 blankets at No 16924 Zengeza 3 Chitungwiza. The respondent contends that the applicant was never despoiled of the motor vehicle in issue Land Rover Discovery but the applicant willingly gave the respondent the motor vehicle as his lawfully wedded wife in June or July 2011 as the applicant had caused the respondent to dispose of her own motor vehicle from her previous marriage. It is the respondent's contention that up to the time of hearing of this matter she had not been served with the summons for divorce. The respondent believes the applicant is desperately trying to get access to matrimonial property without going through the due process of divorce which may entail sharing of this property. The respondent indicated that her marriage to the applicant has irretrievably broken down and she is more than willing to consent to divorce as long as the applicant takes proper legal channels rather than making false reports of car theft and being despoiled.

THE LEGAL POSITION

This is an application for a spoliation order. The wise words of INNES CJ in the classic case of *Nino Boninov De Lange* (1906 TS 120 at 122) enunciates the principles of a spoliation order as follows;

“it is a fundamental principle that no man is allowed to take the law into his own hands, no one is permitted to dispossess another forcibly or wrongfully and against his consent of possession of property whether movable or immovable. If he does so, the court will summarily restore the status *quo ante*, and will do that as a preliminary to any inquiry or investigation into the merits of the dispute.”

The legal requirements for the relief sought by the applicant are also well laid out in the case of *Chisveto v Minister of Local Government and Town Planning* 1984(1) ZLR 248 of 250 A-E.

“It is a well-recognised principle that in spoliation proceedings it need only be proved that the applicant was in possession of something and there was forcible or wrongful interference with his possession of that thing.....that *spoliatus ante omnia restituendus est*... Lawful possession does not enter into it. The purpose of *mandament 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 objectives, it is necessary for status *quo ante* to be restored until such time as a competent court of law assesses the relative merits of claims of each party. Thus it is my view that the lawfulness or otherwise of the applicant’s possession of property in question does not fall for consideration at all.”

See also : *Chikafu v Dodhill Pvt Ltd and Ors* SC 28/09; *Harland Brothers (Pvt) Ltd and Anor v Minister of Lands and Rural Resettlement and Anor* HH6/10 at p4 of the cyclostyled judgment; *Botha & Anor v Barret* 1996 (2) ZLR 73 (SC); *Mutsotso & Ors vs Commissioner of Police & Anor* 1993 (2) ZLR 329.

See also Almer’s Precedents of Pleadings, 7th ed pp 357 – 358 wherein the learned authors discuss the requirements of a spoliation order and that generally it is rarely claimed by way of action by virtue of the urgency that usually accompanies it.

In *casu* the applicant has to show and prove basically two issues; that he was in peaceful and undisturbed possession of the motor vehicle Land Rover Discovery together with property listed in para 20 of his founding affidavit and secondly that the respondent on 11 January 2012 deprived him of the possession forcibly or wrongfully against his consent. In my view the applicant has failed dismally to show and prove on a balance of probability that indeed he was in possession of this property and that he was despoiled. The respective versions of the parties on these issues which I have deliberately outlined in detail clearly shows that despite the matter being urgent (if facts alleged are proved) there are serious

disputes of facts which cannot be resolved on the papers without doing an injustice to the parties. I have highlighted the number of material disputes of fact in this matter which virtually makes it impossible for this court to resolve the matter on the papers filed and possibly grant the relief sought. The parties are not in agreement at all on the following material facts;

- (i) whether respondent has been in possession of the Land Rover motor vehicle from the time of the marriage in July to date.
- (ii) whether the applicant at any stage after the marriage took possession of the motor vehicle.
- (iii) whether respondent visited the applicant's place of residence at all on the night of 11 January 2012.
- (iv) whether the respondent on 11 January 2012 forcibly took the property referred in para 20 of the applicant's founding affidavit or the applicant simply left this property in the respondent's house when he moved out of the matrimonial house.

I am of the strong view that this is not a proper case in which this court can resolve the above dispute of facts raised in the affidavits without hearing of evidence see *CAPS United Football Club (Pvt) Ltd vs CAPS Holdings Limited & 3 ors* SC 11/09.

In the case of *Zimbabwe Bonded Fibre Glass (Pvt) Ltd vs Peech* 1987 (2) ZLR 338 (S) at 339 C – E GUBBAY JA (as he then was) reiterated this principle as follows;

“It is, I think, well established that in motion proceedings a court should endeavour to resolve the dispute raised in affidavits without the hearing of evidence. It must take a robust and common sense approach and not an over fastidious one; always provided that it is convinced that there is no real possibility of any resolution doing an injustice to the other party concerned. Consequently there is a heavy onus upon an applicant seeking relief in motion proceedings, without the calling of evidence, where there is a *bona fide* and not merely an illusory dispute of fact. See *Room Hire Co (Pvt) Ltd v Jeppe Street Mansions (Pvt) Ltd* 1949 (3) SA 1155 (T) at 1165; *Soffiantini v Nould* 1956 (4) SA 150E at 154; *Joosab & Ors v Shah* 1972 RLR 137 137 (G) at 138 G – H; *Lalla v Spafford N.O. & Ors* 1973 RLR 241 (G) at 243 B; *Masukusa v National Foods Ltd and Anor* 1983 (1) ZLR (HC).”

I am satisfied that the relief claimed by the applicant – *mandament van spolie* cannot be granted in view of factual disputes in the matter. The applicant has not shown and proved that he was in peaceful and undisturbed possession of the motor vehicle and other property in issue.

It can not be resolved on papers filed whether the applicant was unlawfully deprived of the possession of his property by the defendant. The merits of both the applicant's and respondent's right to possession of the property are not justiciable at this stage. The denial by the respondent of material allegations made by the applicant cannot be resolved on the papers filed. There are therefore material dispute of facts in the matter which make virtually impossible for this court to grant the relief claimed of restoration of possession *ante omnia*.

In the circumstance, the urgent chamber application is therefore dismissed with costs.

Mupindu & Mugiya Law Chambers, applicant's legal practitioners
Musunga & Associates, respondent's legal practitioners