

PHILEMON MUTANGIRI
and
NYIKADZINO MUTATI
and
LYTON KAUNDA
versus
LEONARD MUTEWA t/a LEONARD TRADING
and
F. NAGO N.O. PROVINCIAL MAGISTRATE

HIGH COURT OF ZIMBABWE
MAFUSIRE J
MASVINGO: 23 & 31 January 2018

Opposed application

Adv W. Chinamora, for the applicants
Mr M.D. Hungwe, for the first respondent
No appearance for the second respondent

MAFUSIRE J:

- [1] This was an application for review. The second respondent was a provincial magistrate. At all relevant times she was stationed at Zaka, one of the districts in the Province of Masvingo. It was the proceedings before her in the court below that were brought on review. On 25 August 2017 she granted a rule *nisi ex parte*. It was a provisional order of spoliation against the applicants herein [respondents therein], in favour of the first respondent herein [applicant therein] [hereafter referred to as “*Mutema*”]. The alleged spoliation was in respect of certain business premises situate Nyika Growth Point, Bikita, namely Stands 745; 746; 747; 748 and 749 and certain items thereon. The businesses being run on those premises comprised a butchery, a supermarket, a takeaway or kiosk, and a warehouse.
- [2] Following the order of spoliation, the applicants were evicted from the premises. Occupation was granted to the respondents.
- [3] The main protagonists have always been Mutema and the first applicant herein [“*Mutangiri*”]. Mutangiri anticipated the return date of the rule *nisi*. He filed a notice

of opposition alleging that the *ex parte nisi* had been procured on the basis of false information. He pressed for the discharge of the rule, and a penal order of costs. His grounds, in my own paraphrase, and not necessarily in the order that they were raised, were these:

- Mutema and his people were not despoiled. It was him and his own people who had at all material times since May 2016 been in occupation of the premises, and running the businesses thereon.
- The premises had previously belonged to a company called Mutema Brothers [Private] Limited in which Mutema had been a major shareholder. The company had gone bankrupt and had been placed under liquidation. The liquidator, who had assumed legal ownership and physical control of the premises, and in terms of a written agreement of sale dated 18 May 2016, which Mutema had signed as the first witness, had sold the premises to Mutangiri for \$100 000. It was following that agreement, and in terms of a clause therein that allowed him to take immediate occupation of the property, that Mutangiri and his people had started running those businesses from those premises.
- Neither Mutema nor any of his people had been in occupation. Mutangiri had no lease or any agreement of any kind with Mutema that would have allowed Mutema and his people to be on the premises.
- Mutema was guilty of forum shopping. The premises were in Bikita. There was a magistrate court at Bikita. But he had gone all the way to Zaka and obtained *ex parte nisi* on the basis of which he had assumed occupation of the premises.

[4] Mutema filed an answering affidavit. He maintained that he had been in occupation of the premises on the permission of the liquidator. As proof, he attached several documents in the form of shop licences; Zimbabwe Revenue Authority [ZIMRA]-linked fiscal invoices; and an affidavit by the liquidator. The liquidator confirmed Mutema's occupation of the premises by his permission. He denied any right of occupation as might have been bestowed by himself on Mutangiri.

[5] Mutema also refuted the allegations of forum shopping. He argued that any provincial magistrate's court is reposed with territorial jurisdiction in the entire province in which it may be situated, notwithstanding that it may be located in a particular district. He said he had been forced by circumstances to seek the order of spoliation from the magistrate court at Zaka because at the crucial moment the magistrate ordinarily stationed at Bikita had not been available.

- [6] On the return date, argument by counsel focused mainly on factual disputes centred on whether or not Mutema had proved spoliation.
- [7] Judgment was reserved. But before it was delivered, and through an advocate, one Mr T Mpofo, Mutangiri filed some supplementary heads of argument. In them, it was first argued that a litigant had a right to bring up any point of law at any time before judgment is passed. The heads then went on to challenge the monetary jurisdiction of the second respondent. It was argued that before the rule *nisi* was granted, and certainly before it could be confirmed or discharged, it had been incumbent upon the second respondent to carry out an enquiry in terms of s 12 of the Magistrates' Court Act, *Cap 7:10*, to ascertain whether or not she had the requisite jurisdiction. It was argued that she did not. The value of Mutema's occupation was way above the monetary limit of jurisdiction of a magistrate's court, which, for this type of dispute, is ten thousand dollars [\$10 000].
- [8] Adv Mpofo's heads of argument also made the point that the order of spoliation had improperly been granted on the basis of a mere *prima facie* case. It was said the evidence of this was the rule *nisi* itself. The law supposes that an order of spoliation is a final order which should be granted only on the basis of a clear right, proved on a balance of probabilities. It was argued that *in casu*, neither Mutema's occupation of the premises, nor his right thereto, had been proved at all.
- [9] Faced with a one sided argument on jurisdiction, the second respondent directed Mutema to also file supplementary heads of argument to deal with the point. He did. He maintained that the second respondent had jurisdiction on account of the fact that the value of his occupation of the premises, which he had sought to be restored into, had to be measured on the basis of the average amount of profit that he generated from the business on a monthly basis. He said it amounted to seven thousand dollars [\$7 000] per month.
- [10] In her final judgment, the second respondent dismissed Mutangiri's challenge on jurisdiction. She held that in matters of this nature 'value' is placed on the subject

matter, not on the value of the property *per se*. She said the subject matter was the occupation of the premises and Mutema's point of sale machines. She rejected the notion that 'value' could relate to the market value of the premises, or the value of the business, or the value of the stock. Finding that Mutema had indeed been despoiled, she confirmed the rule *nisi*.

[11] In this review application, the parties more or less replayed the same arguments as in the court below. I summarise the issues as they were presented as follows:

- whether or not the second respondent had the monetary jurisdiction to deal with the dispute;
- whether it was competent for the second respondent to grant *ex parte* an order of spoliation on the basis of a mere *prima facie* right, as opposed to a clear right, proved on a balance of probabilities;
- whether there had been a material misjoinder of an essential party to the dispute, namely Mutema Brothers [Private] Limited, as the original owner of the properties;
- whether the second respondent had been faced with a dispute of fact so material as to disable her from resolving the matter on the papers;
- whether Mutema had in fact been despoiled.

[12] Both parties agreed that the issue of jurisdiction went to the root of the matter. Only after I found that the second respondent had jurisdiction, would I proceed to consider the rest of the other issues. Therefore, here is my judgment on the issue of jurisdiction.

[13] Two aspects of the order of spoliation by the second respondent read as follows:

- a) Pending the return date of the Rule Nisi, the Respondents be and are hereby ordered to unlock the butchery, bakery, takeaway and supermarket located on Stands 745, 746, 747, 748 and 749 Nyika Growth Point, Bikita and immediately return the keys for same to the Applicant upon service of this order, failing which the Messenger of Court be and is hereby authorized to so act [emphasis by myself].
- b) Pending the return date of the Rule Nisi, the Respondents are to restore Applicant's point of sale machines and remove their point of sale machine(s) from the butchery, bakery, takeaway and supermarket operating from Stands 745, 746, 747, 748 and 749

Nyika Growth Point, Bikita, failing which the Messenger of Court be and is hereby authorized to so act.”

[14] What do the words underlined above mean? What exactly did the second respondent order to be done? Plainly the words meant Mutangiri was to restore to Mutema possession of the premises and of the goods in the shops thereon, and of course, the point of sale machines. Although she did not use the word “deliver”, nonetheless that was what she effectively ordered. She ordered that Mutangiri, failing him, the messenger of court, was to ‘deliver’ those premises and those goods back to Mutema. How? By unlocking the premises. And do what else? Immediately return the keys for the premises to Mutema. That was classically *clavium traditio*, a form of symbolical delivery where, for example, delivery of goods in a warehouse or storeroom, or a car, is achieved by the handing over of the key to the warehouse, or of the car, to enable someone to take possession and control: see SILBERBERG and SCHOEMAN’S *The Law of Property*, 5th ed., at p 181; JTR GIBSON *South African Mercantile and Company Law*, 8th ed., at p 120, and G BRADFIELD & K LEHMANN *Principles of the Law of Sale & Lease*, 3rd ed., at p 17.

[15] The second respondent’s order did not only end with delivery to Mutema. It went on to order the eviction of Mutangiri and his people. Para [d] read:

“The Messenger of Court, Bikita or Zaka be and is hereby directed, authorized and empowered to unlock the butchery, bakery, takeaway and supermarket on Stands 745, 746, 747, 748 and 748 Nyika Growth Point, Bikita **and evict the Respondents** and restore possession of same to Applicant.”

[16] So, if the order of the second respondent was directing Mutangiri to ‘deliver’ the premises and the businesses back to Mutema, and the messenger of court to ‘evict’ Mutangiri if he did not vacate by himself, what was the value of occupation to Mutema? If Mutangiri did not comply, what was Mutema losing? How would this loss be assessed objectively?

[17] Mutema claimed that the value of the spoliation upon him and his people amounted to the value of his profit per month. He put this profit at seven thousand [\$7 000] per

month. The only time he dealt with the question of the second respondent's monetary jurisdiction was Para 9 of his founding affidavit to the *ex parte* application. He said:

“Jurisdiction

9. The business operations I run at the aforesaid premises give me an average profit of plus of [sic] minus seven [7] thousand United States dollars per month and therefore this Honourable Court has the jurisdiction to entertain this matter on the basis of the value derived from my occupation being within the monetary jurisdiction of this Honourable Court.”

[18] The second respondent seemed to agree. In her ruling on the point she said:

“In their supplementary heads the Respondents also averred that this court has no monetary jurisdiction to deal with this matter. In this regard it is trite to note that in applications of this nature value is placed on the subject matter and not the value of the property per se. In this case the subject matter as per the interim order is occupation of the premises situated on the 5 stands mentioned earlier as well as the return of the Applicant's Point of Sale machines. Value is not about the market value or the value of the business as wrongly put by the Respondents neither is it value of stock as wrongly put by the Applicant. It is also trite that the issue of stock was never prayed for by the Applicant. That being the case then this court has jurisdiction to deal with this matter.”

[19] With respect, I have not quite followed the reasoning by the second respondent. But regarding Mutema's Para 9, not only was there no evidence of any sort on this seven thousand dollars value, but also there was no basis laid down for this particular mode of computation. Both the figure and the mode of computation seemed plucked straight from the air. But that is not my major concern. The second respondent, with all due deference to her, manifestly misdirected herself. Here is how.

[20] By s 12 of the Magistrates Court Act, magistrates' courts have the jurisdiction, among other things, to grant spoliation orders. However, this power is made subject to the limits of jurisdiction prescribed by the Act.

[21] It is s 11 of the Act that governs the civil jurisdiction of the magistrates' courts. In this regard subsection [1], par [b], sub-paras [ii] and [iii], and the proviso thereto, say:

“11 Jurisdiction in civil cases

[1] Every court shall have in all civil cases, whether determinable by the general law of Zimbabwe or by customary law, the following jurisdiction—

[a]

[b] with regard to causes of action—

- [i]
- [ii] in actions in which is claimed the delivery or transfer of any property, movable or immovable, **where the value of such property does not exceed such amount as may be prescribed in rules**, whether in lieu of or in addition to any other claim, which shall include a claim for the cancellation of any agreement relating to such property;
- [iii] in actions of ejectment against the occupier of any house, land or premises situate within the province:

Provided that, **where the right of occupation of any such house, land or premises** is in dispute between the parties, such right does not exceed such amount as may be prescribed in rules in clear value to the occupier;”
[emphasis by myself]

- [22] By Statutory Instrument 163 of 2012 [Magistrates Court [Civil Jurisdiction] [Monetary Limits] Rules, 2012], the monetary civil jurisdiction of the magistrates court was set at ten thousand dollars [\$10 000] for, among others, actions for delivery of movables or immovables and actions for ejectment.
- [23] Plainly, the case before the second respondent was a tussle for possession, not only of the premises, but also of the goods inside them. Both parties claimed ownership of the goods. They went to great lengths to prove it. Both claimed the right to, and of, possession of those goods, and the right to trade in them. Both claimed they had been in occupation and possession at all material times. Therefore, at the outset, the law required the second respondent to enquire into the aspect of her monetary jurisdiction. She did. But she used the wrong yardstick.
- [24] As pointed out above, by s 11[1][b] [i] and [iii] of the Act, and the proviso to sub-para [iii], the second respondent was obliged to assess the ‘clear value’ of Mutema’s occupation and possession of the premises; the stock-in-trade; the point of sale machines; the equipment; and everything else that the parties tussled over. The words ‘delivery’ and ‘transfer’ in sub-para [ii] evidently speak to possession and ownership respectively. Of course, ownership was of no moment. The second respondent was right on this. The remedy of spoliation seeks to protect the right of possession: see SILBERBERG and SCHOEMAN’S, *supra*, para 13.2.1.2 at p 288; *Kama*

*Construction [Pvt] Ltd v Cold Comfort Farm Co-operative & Ors*¹; *Botha & Anor v Barrett*²; *Muller v Muller*³; *Shoprite Checkers Ltd v Pangbourne Properties Ltd*⁴ and *Grandwell Holdings [Private] Limited v Minister of Mines and Mining Development & Ors*⁵.

- [25] The net profit per month was just an arbitrary method of assessing value. It has no legal basis. Asked by myself at the hearing to explain the rationale of the use of profits for a period of a month, instead of profits for any other period like a day; a week; six months or a year; or even using the monthly rentals as a yardstick, Mr *Hungwe*, for the respondents, argued that one month was the period of notice Mutema would be entitled to if the liquidator, at whose pleasure he occupied the premises, required him to vacate. He said Mutema was not paying rent, but was merely paying licence fees and other taxes connected to the business operations. However, Mr *Hungwe* conceded that this arrangement was not mentioned anywhere in the papers, or raised in the arguments presented in the court below.
- [26] Mr *Chinamora*, for the applicants, drew attention to certain documents submitted by Mutema in the court below by which he meant to prove his exclusive occupation of the premises. These included licence fees and levies paid by himself to the local authorities. The fees or levies were for three monthly periods at a time, such as July to September 2017 or April to June 2016. Mr *Chinamora*'s point was that the value of Mutema's occupation, at the very least, and using his own mode of computation, could not be less than the profits he expected to realise for those three monthly periods for which he had paid the licence fees or levies. This, to me, made sense, but was obviously not the full argument.
- [27] I consider that in her enquiry, the second respondent ought to have found that the value of Mutema's occupation, even going by his own method of computation, far exceeded ten thousand dollars. For example, at seven thousand dollars per month, the

¹ 1999 [2] ZLR 19 [SC]

² 1996 [2] ZLR 73 [S], at p 79D - F

³ 1915 TPD 29, at p 31

⁴ 1994 [1] SA 616 [W]

⁵ HH 193-16

profit for any three-month period would be twenty-one thousand [\$21 000] dollars.

But more importantly, figures in the court below were bandied about to show that the value of the stocks in the supermarket, warehouse and other premises over which the parties fought, far exceeded ten thousand dollars. Certainly, if he made an average profit of seven thousand dollars per month, then by simple logic, the value of the goods he was trading in would have been well in excess of this amount.

- [28] I consider that using the margin of profit as the yardstick to compute Mutema's occupation, was also illogical for another reason. He was not trading from the air. He was not trading thin air. He was trading from the premises. He was trading in those very goods he had allegedly been despoiled of. Thus, he could only make profits after being in possession and control of the premises, and of the stocks, and trading from the premise, and trading in the goods. If he had been unlawfully dispossessed of the premises, and of the goods, as he alleged, then he had nothing to sell, and nowhere to sell from, and therefore nothing by which to generate any profit.
- [29] Admittedly, the issue of 'value', in relation to Mutema's occupation of only the premises [without the goods], was more problematic. That value could not be the same amount as the market value of the property, namely one hundred thousand [\$100 000], which Mutangiri said he was charged by the liquidator; or the over three hundred thousand [\$300 000], which Mutema, in his suit against the liquidator for allegedly undervaluing the premises, said was the correct market value. To compound this particular problem, Mutema said he was not paying any rentals for his occupation, but merely licence fees and levies, to keep the businesses operational.
- [30] However, and be that as it may, Mutema's occupation certainly had a pecuniary value. He needed premises to store his stock in. He needed premises to sell those stocks from. He would need to rent premises from someone else if the disputed ones had not been available, or if the liquidator had not given him occupation for free, as he said. The second respondent did not make an enquiry in this regard. None of the parties gave her any figures on this. Mr *Hungwe* argued that the onus had been on Mutangiri to place information before the court on which his challenge on the second respondent's lack of jurisdiction was based.

- [31] However, the absence of an amount on the value of Mutema's occupation of the premises should not have led to the second respondent assuming jurisdiction. The cumulative value of Mutema's occupation, i.e. the value of the stocks; the equipment; the profits; and occupation of the premises, far exceeded ten thousand dollars. That should have been the end of the matter.
- [32] The law says any judgment given in excess of the jurisdiction of a court which is not one of inherent jurisdiction is a nullity, see *Manning v Manning*⁶ and *Madzwawawa v Vambe*⁷. The second respondent had no jurisdiction to deal with the dispute in this matter. Therefore, the entire proceedings were a complete nullity.
- [33] My findings above, and indeed as the parties acknowledged, make it unnecessary to consider the rest of the other issues.
- [34] The applicants claimed costs on an attorney and client scale. The general rule is that costs follow the event. The loser pays the winner's costs. However, it is also the rule that costs are entirely in the discretion of the court. This discretion is exercised judiciously, not whimsically.
- [35] In the particular circumstances of this case, I have considered that the applicants are not entitled to costs. Although I have not dealt with the issue of spoliation on the merits, nonetheless, I have considered that in the court below, Mutangiri was approbating and reprobating on an important issue, and thereby misleading the court. For example, when he opposed the confirmation of the rule *nisi*, he swore an affidavit that Mutema had no lease or agreement of any kind that would have entitled him to occupation of the disputed premises. When that was not gaining traction, he made a summersault and claimed that there had been some verbal agreement between him and Mutema entitling Mutema occupation of portions of the building.
- [36] Furthermore, whether or not Mutangiri's actions amounted to spoliation *per se*, it was certainly his conduct that sparked litigation. The liquidator did not support his own

⁶ 1986 [2] ZLR 1 [SC]

⁷ HH 65-12

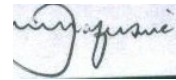
claim to possession, but supported that of Mutema. I still make no findings on the merits except to take this into account in considering the question of costs.

[37] Finally, initially Mutangiri queried the territorial jurisdiction of the second respondent before he quietly dropped the argument. This was plainly a dud point. Raising it amounted to wasting time.

[38] In the final analysis, I make the following order:

- The second respondent had no jurisdiction to deal with the dispute in this matter. The proceedings in the court below are hereby quashed. The putative rule *nisi* issued on 25 August 2017 in case no GL 87/17, and subsequently confirmed on 5 October 2017, is hereby set aside.
- There shall be no order as to costs.

31 January 2018



Matutu & Kwirira, legal practitioners for the applicants

Kadzere, Hungwe & Mandevere, legal practitioners for the first respondent