

REPORTABLE (31)

STREAMSLEIGH INVESTMENTS (PRIVATE) LIMITED
v
AUTOBAND INVESTMENTS (PRIVATE) LIMITED

SUPREME COURT OF ZIMBABWE
MALABA DCJ, GARWE JA & GOWORA JA
HARARE, SEPTEMBER 11, 2012 & JUNE 17, 2014

A P de Bourbon SC, for the appellant

L Uriri, for the respondent

GOWORA JA: This is an appeal against a judgment of the High Court dismissing an application firstly for a declaration of rights in respect of an immovable property known as No 15 Lanark Rd Avondale Harare and secondly for an interdict against the eviction of the appellant from the said premises.

Pending this appeal, on 5 September 2012, the respondent filed a chamber application for leave to adduce further evidence. The appellant filed a notice of opposition and an opposing affidavit. For reasons that follow, it will not be necessary to traverse the contents of the affidavits filed in that application.

Mr *de Bourbon*, on behalf of the appellant raised a point *in limine* to the effect that the application did not comply with the rules of the Supreme Court, in particular r 39 which provides that no less than five days' notice of the date of hearing shall be given by the applicant. The appellant had opposed the application citing the lack of compliance with the Rules and the failure to give notice as provided in the rules. It is common cause that the

respondent ignored the notice of opposition and in particular the peremptory requirements of the rules which the appellant made reference to.

It is my view that in making that submission Mr de Bourbon was correct. The application could only have been made in terms of s 39 of the Supreme Court Rules, 1964.

The rule reads in relevant part:

“39. Applications

- (1) Subject to the provisions of rules 31, 36, 37 and 38, applications shall be by court application signed by the applicant or his legal representative and accompanied by an affidavit setting out any facts which are relied upon.
- (2)
- (3)
- (4) An application to lead further evidence on appeal shall be accompanied by that evidence in the form of an affidavit and also by an affidavit, or a statement from counsel, showing why the evidence was not led at the trial, as also a copy of the judgment appealed from and a statement indicating in what manner it is alleged the evidence sought to be adduced affects the matters at issue.
- (5) When making an application the applicant shall, if he wishes to state the date of hearing in his court application, arrange a suitable date with a registrar prior to serving the application. Where no such date has been arranged the registrar shall appoint a date of hearing and notify the parties of the date:

Provided that no less than five days’ notice of the date of hearing shall be given by the applicant or by the registrar, as the case may be.”

In terms of sub-rule (5), an application under the rule must be heard upon no less than five days’ notice. The respondent served the application on the appellant three days before the appeal was scheduled to be heard. Clearly, there was no compliance with the rule.

Mr *Uriri* conceded that the application did not meet the peremptory requirements set out in r 39 and, submitted that, in fairness, he could not persist with the application. The concession was properly made. Accordingly, the application was struck off the roll with the respondent being ordered to pay the costs. I turn now to the merits of the appeal itself.

The facts surrounding this dispute are convoluted and I will endeavour to simplify them. At the centre of the dispute is control of the Trauma Centre. Although the parties involved in the dispute refer to the ownership of the same, in this matter the court is seized only with the question of which of the parties is legally entitled to the physical occupation and possession of the same.

The “Trauma Centre” is a state of the art hospital which is situated at 15 Lanark Road in Harare. It is common cause that for a considerable period the hospital leased the premises from the administrators of the estate of the late Rosa Alhadeff. On 30 March 2010 the ownership of the land on which the hospital is situated was transferred to Streamsleigh Investments (Pvt) Ltd, the appellant herein.

The appellant is a private company which is duly registered in Zimbabwe in accordance with the laws of the country. Its shareholding is at the core of the dispute between the parties, which dispute is however not the issue presently for determination before this court. Its directors upon registration were Wessel Roets and Zarina Dudhia. The latter was also the Principal Officer of the company.

The respondent is a private company duly registered in accordance with the laws of Zimbabwe. On 30 January 2008, the respondent concluded a management agreement with CA Meifco Limited, which is a company registered in accordance with the laws of Mauritius, for the provision of certain specified services by CA Meifco to the respondent at what is colloquially referred to as the “Trauma Centre”. The agreement was to run for a period of five years from the effective date.

A management team comprising Dr Vivek Solanki, Marco Cerunski and Wessels Roets was to be responsible for the overall management of the Trauma Centre. CA Meifco was responsible for the financial management of the hospital including the procurement of medication. On an undisclosed date CA Meifco changed its name to VIP Healthcare Solutions. Although it was not specifically mentioned in the agreement, CA Meifco was a wholly owned subsidiary of African Medical Investments Plc, (“AMI Plc”).

On 26 April 2010, AMI Plc executed a Deed of Trust in terms of which The Streamsleigh Trust was created. Jeremy Darroll Stewart Sanford, Anis Abdulkarim Omar and Gary Maitland Crosland were named as Trustees. On 28 April 2010 Streamsleigh Investments (Private) Limited issued a share certificate in terms of which The Streamsleigh Trust was recorded as the holder of 100 fully paid shares of USD 0.001 each. On the same date Jeremy Darroll Stewart Sanford was appointed as one of the directors of the company in addition to Dudhia and Roets.

On 28 September 2011 the respondent filed an application in the Magistrates Court Harare. The deponent to the affidavit was Dr Vivek Solanki, (“Solanki”) who described himself as the founder and director of the respondent company. In the application AMI Plc was cited as the sole respondent.

In the founding affidavit, Solanki alleged that he had incorporated Autoband Investments (Pvt) Ltd, (the respondent in this appeal) and that, pursuant thereto he had been leasing the premises at No 15 Lanark Road for about fifteen (15) years. He averred further that he had been approached by officers of AMI Plc with a proposal that Autoband enter into a joint venture agreement with the former and the negotiations had culminated in the parties

executing a management agreement in terms of which AMI Plc was to purchase Autoband. He averred that the agreement had fallen through and subsequent to that the employees of AMI Plc had unlawfully evicted the employees of Autoband from No 15 Lanark Rd during his absence from the country. In the affidavit, Solanki alleged that the employees of Autoband had been intimidated by people who posed as police officers, and who later turned out to be bogus. It was further alleged in the affidavit that AMI Plc had taken the law into its hands and evicted Autoband and its employees illegally from the premises that it had been leasing for over fifteen (15) years. The draft order attached to the application sought the eviction of anyone seeking occupation through AMI Plc.

The application was opposed by the appellant. The deponent to the opposing affidavit, one Peter J Annesley, described himself as “the Chief Operating Officer of Streamsleigh Investments (Private) Limited”, a duly registered company which trades under the name of AMI Hospital Harare. It seems to have escaped the notice of Annesley and his legal practitioners that the appellant had not been cited as a party to the application and that it could not challenge the application unless it was joined as a party.

In his response to the opposing affidavit, Solanki claimed that Streamsleigh Investments (Pvt) Ltd was a company in which he had an interest and he put into issue the status of Annesley in the said company. Presented with these facts, the learned magistrate who heard the application found that the appellant’s occupation of the premises was questionable in the absence of proof to show that the respondent had been removed from the same lawfully. The magistrate as a consequence found that the respondent had been dispossessed unlawfully as there was no court order prior to its eviction. The magistrate

then ruled that the respondent was entitled to an order for restoration and consequent thereto issued the following order:

“The respondent, its officials and anyone claiming through them and grant (sic) restored occupation to the Applicant 7 days upon delivery of judgment.”

An appeal was noted against the judgment of the magistrate and in response the respondent sought and obtained an order for leave to execute pending appeal. Consequent thereto, Autoband obtained a writ of eviction. Being the registered owner of the premises in question, the appellant considered that its position had been compromised by the order. It had to protect its occupation and as a result it approached the High Court on a certificate of urgency in which it sought a Provisional Order in the following terms:

“TERMS OF INTERIM RELIEF SOUGHT

IT IS ORDERED THAT:

1. In the absence of any direct order against the Applicant for its eviction from Stand No 2924 Salisbury Township of Salisbury Township Lands also known as No 15 Lanark Road, Belgravia, Harare, the Respondent be and is hereby interdicted from utilizing the eviction order in Case No MC 16435/11 to evict the Applicant from the premises set out hereabove.
2. The Respondent be and is hereby interdicted from utilizing any relief obtained in Case Nos HC 619/11 and 2125/11 against the Applicant.
3. The Respondent be and is hereby ordered to pay the costs of this application.”

TERMS OF FINAL ORDER SOUGHT

IT IS DECLARED THAT:

1. The eviction order granted in Case MC 16435/11 between the Respondent and African Medical Investments Plc is of no force, effect or application as against Applicant and its occupation of the premises known as Stand No 2924 Salisbury Township of Salisbury Township Lands also known as No 15 Lanark Road, Belgravia, Harare.
2. Any relief granted in Case Nos HC 619/11 and 2125/11 be and are hereby declared to be of no force, effect or application as against Applicant in respect of its occupation of their(sic) premises known as Stand No 2924 Salisbury Township of Salisbury Township Lands also known as No 15 Lanark Road, Belgravia Harare.

3. That the Respondent pay the costs of this application.

The respondent opposed the application and in turn the appellant filed an answering affidavit. The learned judge before whom the urgent chamber application was placed, understandably, faced with the apparent disputes was unable to issue an order in terms of the interim relief being sought and instead issued a provisional order by consent which preserved the rights of the parties pending the hearing and determination of the application for relief in terms of the final order sought. He also gave directions for the filing of further affidavits by the parties as well as heads of argument. The matter was subsequently set down before a different judge who, after hearing counsel dismissed the application and discharged the provisional order. Following upon the discharge, the appellant was ordered to pay punitive costs. It is against that judgment that the appellant has noted an appeal to this Court.

It was contended on behalf of the appellant that the critical issue before the High Court was whether or not it was AMI Plc or Streamsleigh (Pvt) Ltd which was in occupation of the premises at the time that the eviction order was granted. I agree that this was the critical issue for resolution by the court *a quo* in the determination of the application for the *declaratur* and consequential relief sought by the appellant.

The learned judge in the High Court was persuaded to accept that the finding by the magistrate as to who was in possession of No 15 Lanark Rd was correct, and that consequent thereto, the respondent had been illegally dispossessed of its occupation of the same. This is what the learned judge had to say at pp 3 to 4 of the cyclostyled judgment:

“I am extremely concerned with the approach being advocated by the applicant in this case. It wants this court to grant a declaratory order to subvert a process that started in the lower court in which it actively participated and lost. I see nothing but a stout (sic)

effort to indulge in forum shopping and the High Court must not be used to subvert court process emanating from the lower court for no good cause. I agree with the forceful submissions made by Adv *Uriri* that in these circumstances a declaratory order would not be competent.

Before concluding this matter, I wish to observe that the applicant has placed so much emphasis on the ownership of stand 2924 Salisbury Township of Salisbury Township Lands (No 15 Lanark Road, Belgravia, Harare). The application for eviction had nothing to do with the ownership of the property but was restricted to possessory rights of the applicant in the lower court. Again this issue was dealt by the lower court in its judgement referred to above. The lower court made a specific finding that the now respondent had been unlawfully dispossessed of the property. The applicant exercised its right of appeal against the decision of the lower court and certainly it was not competent for the applicant to apply for a declaratory order to short circuit the appeal process.”

The learned judge in the court *a quo* concluded that the magistrate was correct in finding that the respondent had been unlawfully dispossessed by the appellant. It is clear that the judge based his decision on a number of documents placed before him by the parties.

A perusal of the documents reveals the following. On 13 December 2010 the appellant wrote to the City of Harare requesting that an inspection be carried out at No 15 Lanark Rd. The inspection was carried out on 15 December 2010 as confirmed by a letter written to the appellant by that department on 20 December 2010. Ultimately, the stand was registered as a hospital. On 15 April 2011 the Civil Aviation Authority of Zimbabwe allocated the appellant an account for the use of facilities at its premises for navigation, landing, parking and other apron fees. On 1 March 2011, the Medicine Control Authority of Zimbabwe issued a hospital pharmacy licence to the appellant. Lastly, on 27 January 2012 the City of Harare issued a Municipal Licence to the appellant for a coffee shop.

Indeed, as stated by the learned judge in the court *a quo*, there are documents in the form of statements of accounts apparently generated by African Medical Investments t/a Streamsleigh Investments Plc addressed to a number of individuals who appear to be patients or recipients of services. In my view, the documents in question do not confirm that the occupant of the premises was AMI Plc. They confirm instead, that a subsidiary of AMI Plc was running the hospital, as indicated by the statutory licences and permissions granted in the name of the appellant.

The respondent accepts that in the proceedings before the magistrate it bore the *onus* to prove that an act of spoliation was committed by the appellant. The affidavit in relation to the alleged act of spoliation was adduced by Solanki. He stated that the act of spoliation had happened in his absence from the country. This is how the alleged act is described:

“I was however surprised that the respondent’s employees unlawfully and illegally evicted Applicant’s employees whilst I was out of the country. The respondent used unorthodox means to evict applicant’s employees including robbery, theft, corruption and fraud as a result the respondent took occupation, such occupation was and remains unlawful as they did not obtain a court order neither did they agree with me or my employees.”

Where an act of spoliation has been alleged, it is trite that the act of spoliation has to be proved. The respondent, did not state when such act occurred, how it occurred or by whom it was perpetrated. In his founding affidavit Dr Solanki refers in general terms to ‘robbery, theft, corruption and fraud,’ as constituting the act of spoliation. It cannot be gainsaid that robbery, theft, corruption and fraud are different and distinct species of criminal offences. Each of the offences referred to by the respondent as having been perpetrated has its own separate essential elements constituting the specific offence. The respondent does not, in the affidavit of Solanki, give details on each of the alleged offences nor does he state

how each of these acts which are alleged to constitute spoliation were effected, when they occurred or by whom they were perpetrated. In short, the affidavit is devoid of any specifics on the act of spoliation in terms of which the order of eviction was premised. It is lacking in detail and substance as to how the respondent was illegally dispossessed of occupation.

In my view the record does not reflect that the respondent has discharged the *onus* it bears. In *Nino Bonino v de Lange* 1906 TS 120, INNES CJ stated the following in describing acts of spoliation:

“The best definition I have been able to find is one given by Leyser, who states 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 a legal right.”

It has been stated in numerous authorities that before an order for a *mandement van spolie* may be issued an applicant must establish that he was in peaceful and undisturbed possession and was deprived illicitly. In *Scoop Industries (Pty) Ltd v Langlaagte Estate & GM Co Ltd* (In Vol Liq) 1948 (1) SA 91 (W) LUCAS A.J said at pp 98-99:

“Two factors are requisite to found a claim for an order for restitution on an allegation of spoliation. The first is that the applicant was in possession and, the second that he has been wrongfully deprived of that possession against his wish. It has been laid down that there must be clear proof of possession and of the illicit deprivation before the order is granted. (See *Rieseberg v Rieseberg* 1926 WLD 59 at 65). It must be shown that the applicant had free and undisturbed possession (*Hall v Pitsoane* 1911 TPD 853). When it is shown that there was such possession, which is possession in the physical fact and not in the juridical sense, and there has been such deprivation, the applicant has a right to be restored in possession ante omnia. On a claim for such restoration it is not a valid defence to set up a claim on the merits.”

Broken down in simple terms, an applicant for an order for a *mandament van spolie* must establish the following:

- “(1) That he was in peaceful and undisturbed possession of the property;
- (2) That he was unlawfully deprived of such possession.”

See also *Davis v Davis* 1990 (2) ZLR 136 (H), at 141B-C.

It was necessary, in my view for the respondent to have shown that it was in occupation of the premises in question and that further to that it was, in fact, the appellant, as opposed to AMI Plc, that caused its unlawful dispossession from the premises. It did not establish that it was in peaceful and undisturbed possession and that it was disposed by the appellant. Consequently, there is no substance to the allegation by the respondent that it had been unlawfully dispossessed of occupation of the hospital premises by the AMI Plc against which it took no action.

I therefore conclude that the learned judge misdirected himself in accepting the finding by the magistrate that the respondent had been unlawfully removed from the premises by AMI Plc.

In my view, the resolution of which entity was in lawful possession of the premises is critical in the determination as to whether or not the learned judge was correct in dismissing the application, as the finding would put paid to the allegation by the respondent that AMI Plc caused its unlawful ejection from the premises. However, the issue before this Court does not end there.

It is trite that a party is not entitled to use the court system in a manner that undermines the judicial process. The learned judge in the court *a quo* was of the view that,

by seeking a *declaratur* before the High Court, the appellant was attempting to subvert a process that had started in the lower court and in which the appellant had participated. As a consequence of that view, the learned judge not only dismissed the application, he also granted an order of punitive costs against the appellant. The learned judge was clearly in error.

Contrary to the assertions by the respondent that the appellant had gone forum shopping by seeking a *declaratur* in the High Court, the entire process that plagues the dispute between the parties commenced in the High Court and not in the Magistrates Court as is being alleged by the respondent which error was further compounded by the learned judge in the court *a quo*.

A narration of the sequence of events appears from the appellant's heads of argument which sets out the facts as follows. The respondent brought an urgent chamber application on 28 February 2011 in an effort to interdict the appellant from proceeding with the imminent opening of the hospital. The court however opined that the matter was not urgent. Despite the finding of the lack of urgency, the appellant filed opposing papers. It is common cause that the application has not been pursued by the respondent.

Apart from the urgent chamber application referred to above, the parties also filed documents under Case No HC 619/11. Again this application is at a standstill. The application in the Magistrates Court was filed on 28 September 2011. It is obvious that by the time the respondent filed the application in the Magistrates Court, it had become aware, from the documents filed in the two High Court applications mentioned above, that the appellant was in occupation of the hospital, yet it chose deliberately not to cite the appellant in the application for an order for spoliation.

In addition, if regard is had to the attempt by the respondent to obtain an interdict against the opening of the hospital, the assertion that it had been despoiled sounds hollow and instead points to an apparent intent to mislead the court. The record speaks for itself and shows that before the filing of the application in the Magistrates Court the parties had been involved in other proceedings over the same issue in the High Court and that several matters were pending in that court which could have achieved the same result as the respondent sought to obtain from the Magistrates Court. Between 2 July 2010 and 28 February 2011 the respondent brought three applications before the High Court, all of them seeking the eviction of AMI Plc from 15 Lanark Rd. Clearly, as argued by the appellant, the respondent went forum shopping after realising that it could not obtain relief in the High Court.

In an answering affidavit before the Magistrates Court, Solanki averred that the respondent was seeking an order for spoliation before that court and went on to aver that in the High Court the applications were substantially different as the relief being sought in one of the applications was an order for the eviction of AMI Plc. This was far from the truth and, sadly, the learned magistrate failed to relate to the whole application by the respondent in respect of which the relief being sought was an order of eviction. The draft order was similarly worded.

Apart from a bald allegation that it was in possession, the respondent did not, before the magistrate or the High Court, establish proof of its occupation of the disputed premises. The affidavit from Solanki suggests that he occupied No 15 Lanark Rd in his personal capacity which, given the documents in the record, is an obvious lie. He was not in occupation, but was on the premises pursuant to the management agreement that got terminated, which termination he accepted.

According to the documents on the record Dr Solanki was employed by AMC Plc and was one of the directors of the company. When the management agreement was concluded with Autoband, he, Marco Cerunshi and Wessel Roets constituted the management team on behalf of AMI Plc.

On 9 July 2010 Sallans LLP, the Legal Practitioners for African Medical Investments addressed a letter to Dr Vivek Solanki, who, at the relevant time was in Mozambique, in the following terms:

“Following upon the management discussion on 30 June 2010 and the subsequent engagement of independent auditors to conduct investigations into the group’s operations in Harare and Johannesburg, as lawyers for the Company we are instructed by the Board of the Company to write to confirm that, as of the date of this letter, you are suspended from work until further notice pending investigation into an allegation of gross misconduct in relation to potential financial and administrative irregularities at the Company’s Harare and Johannesburg medical facilities. The Company reserves the right to change or add to this allegation as appropriate in the light of its investigation.

.....

During your suspension, the Company shall continue to pay your salary in the normal way. You are also entitled to your normal contractual benefits.

You will continue to be employed by the Company throughout your suspension and you remain bound by your terms and conditions of employment, including but not limited to your duty of fidelity. You are required to co-operate in the Company’s investigation and you may be required to attend, remotely or in person, investigative interviews or disciplinary hearings. However, you are not otherwise required to carry out any of your duties and you should not attend any of the group’s operational locations unless authorised by Phil Edmonds to do so. Your e-mail account will be suspended. You must not communicate with any of the group’s employees, contractors, suppliers or customers unless authorised by Phil Edmonds or Brett Winstone in writing. However, you are required to be available to answer any work related queries.

.....

If you require access to the group’s premises or computer network during the period of suspension please let Brett Winstone know as the Company may agree to arrange this under supervision.

If you have any questions about this matter or the terms of your suspension please feel free to contact Philip Enoch.”

The response from Dr Solanki was as follows:

“This letter is formal notice that I hereby resign as Chief Executive Officer of African Medical Investments Plc (“AMI”), to which I was appointed pursuant to the Directors’ Service Agreement (“the agreement”) made on or about 3rd October 2008.

AMI is in repudiatory breach of the Agreement and by resigning I hereby accept such repudiation and give AMI notice of such acceptance. It follows that I have been wrongfully constructively dismissed by AMI. A detailed letter setting out particulars of AMI’s repudiation of the Agreement, is in the course of preparation, and will be sent once it has been concluded.

I also give notice that I hereby resign my directorship in AMI.

I intend to claim compensation and / or damages for having been wrongfully constructively dismissed, including representing twelve (12) months loss of salary.

In the event that you dispute my entitlement to resign as mentioned above, then I give you notice that a difference dispute will have arisen within the meaning of clause 20.3 of the Agreement.”

When these two letters are examined against the averments in the affidavits attested to by Solanki, the only conclusion that one can reach is that there is a grand scheme at fraud on his part. Firstly, it is claimed by Solanki that he is the founder and director of Autoband. He then claims that he was approached by the AMI Plc in 2009 with a proposal to go into a joint venture which would involve the exchange of shares. He claims further that the negotiations fell through but that they executed a management agreement in respect of the Harare operations. Yet in the letter quoted above, he admits to being an employee of AMI Plc. In none of the applications did he submit proof of ownership of shares in Autoband nor did he file a form CR 14 from the Registrar of Companies establishing that he was indeed a director of the respondent. It is common cause that in this jurisdiction records in companies are kept by the Companies Registry and a Form CR 14 constitutes confirmation of the names

of the directors appointed to a company. Ironically, such a form has been filed in respect of Streamsleigh, in which Solanki's name does not appear on the list of directors.

According to Solanki he had been in occupation of the premises as a tenant for a period in excess of fifteen (15) years. The letter from *Kantor & Immerman* of 19 August 2008 identifies the tenant to the premises as VBL Medical Networks (Pvt) Ltd which clearly discounts the version by Solanki that he was the tenant to the premises.

Further to this the management contract in terms of which the respondent occupied the hospital was terminated. On 30 August 2010 the interim Chief Executive Officer for African Medical Investments addressed a letter to the respondent which reads as follows in relevant part:

“On behalf of our wholly owned subsidiary VIP Healthcare Solutions Limited (formerly known as CA Meifco Limited “VIP”) as a result of numerous alleged transgressions, relating to fraud, mismanagement and misappropriation of funds at the Trauma Centre Harare, we hereby give you notice, pursuant to clause 9.1 of the Management Agreement entered into between yourself and VIP that, if such breaches are not remedied within 5 days of the date of this letter, the Management Agreement shall be formally terminated.

.....

If you fail to remedy the breaches referred to above in the specified time limit and the Management Agreement is terminated you shall immediately cease to hold yourself out as having any connection with African Medical Investments Plc or any of its group companies. We will reserve our rights against you in the event that you fail to take such actions as and when required.”

The respondent has not adverted to this letter nor sought to explain how it remained in possession of the premises given the relationship between itself and AMI Plc. If the respondent or Solanki assumed occupation after the date of the letter it has not been stated on the papers. The respondent is a corporate entity and in the light of its claim that it was

running a hospital, it was incumbent that it established before the magistrate proof of its occupation. Although it alleged a lease, no lease agreement was produced. Given the fact that the appellant was the registered owner, there was no evidence adduced as to who the premises were being leased from. In addition, a hospital has licences and permissions from various authorities which enable it to operate as such. There was no attempt by the respondent to produce any document in its name to establish its occupation of the premises.

It was argued that the manner in which the eviction order was framed did not put the appellant at risk of being evicted at the instance of the respondent, a factor which appears to have escaped the notice of the learned judge. An order for the eviction of AMI Plc would not disturb the lawful occupation of the premises by the appellant as such order is not aimed at the latter. I agree. This is because there was no allegation that it had been the appellant that was responsible for the alleged acts of spoliation being complained of.

It was stated by the court *a quo* that the identity of the property had never been in issue and that it was clear that all the parties were aware that the property being referred to was No 15 Lanark Rd. I am not convinced that this is a correct interpretation of the order from the Magistrates Court. The order did not mention the premises from which the respondent sought that AMI Plc should be evicted. The order also sought the eviction of officials without specifying the names of which officials it was seeking to be evicted.

An order must be framed in such a manner as to leave no doubt in the minds of any party to the dispute as to its meaning, effect and application. It should not be vague or ambiguous. It must be clear and precise. That said, the same cannot be said of the order issued by the magistrate. The premises from which the occupants are to be evicted are not

specified. In addition the order targeted anyone who was not an official of the respondent and, given that it was common cause that the premises were owned by the appellant, it put the owner at risk of being evicted, which is what occurred. The obvious deficiencies in the order left the discretion of the description and location of the premises and further to that, the identification of the targeted officials to be evicted to the Messenger of Court.

The appellant argued before the High Court that the respondent, having been aware of its occupation of the premises, should have addressed the application to it and not to a party which was not in occupation at the relevant time. The learned judge however, was of the view that the appellant should have sought to be joined in the proceedings before the magistrate. In my view he erred. The appellant had placed before the court sufficient evidence which established that it was in occupation and further that it owned the premises. That should have alerted the learned judge to the very real danger of the appellant being evicted without due process. It was not the obligation of the appellant to seek joinder. To the contrary, the respondent had the obligation to seek the eviction of the party that was in occupation. The fact that the appellant had not sought to be joined in any of the cases was not sufficient cause for the court to dismiss the application. There was sufficient evidence of the interest that the appellant claimed to have in the property on the papers to entitle it to a *declaratur* being issued in its favour. The finding therefore that the appellant lacked *bona fides* because of the failure to seek joinder is not correct. This is so for a number of reasons which I shall clarify below.

The application for a *declaratur* in the court *a quo* involved the existence or otherwise of two rights, *viz*; the right of the appellant to occupy the premises that it indisputably owned and from which it had operated in excess of one year, and secondly, the

right of the appellant to be afforded a fair hearing before the Magistrates Court. The appellant's legal representatives had clearly erred in the procedure that they adopted. They opposed a number of legal processes in which it was not cited as a party. They should have applied for its joinder in the applications in question.

The papers filed on behalf of the appellant clearly exhibited that the premises in question were owned by the appellant which fact was never disputed by the respondent. The papers in addition, raised the possible existence of a prior management contract between the parties and the possibility of disputes of fact in the application before the learned magistrate and in the numerous applications filed by the respondent in the High Court which had seemingly been abandoned.

A declaratory order under s 14 of the High Court Act [*Cap 7:06*] is appropriate to determine any existing, future or contingent right or obligation. An applicant for a declaratory order must be an interested person in the sense of having a direct and substantial interest in the subject matter of the suit which could be prejudicially affected by the judgment of the court. In addition, an applicant must establish that some tangible and justifiable advantage in relation to its position with reference to an existing, future or contingent legal right or obligation may appear to flow from the grant of the declaratory order sought. See *Johnsen v Agricultural Finance Corporation* 1995 (1) ZLR 65, (S) at 72E-F, *Munn Publishing (Pvt) Ltd v Zimbabwe Broadcasting Corporation* 1994 (1) ZLR 337, (S) at p 344.

The dispute between the parties in the Magistrates Court was not concerned with a declaratory order and in this jurisdiction only the High Court is empowered to issue a

declaratory order. There can therefore be no legal justification to accuse the appellant of forum shopping in seeking a declaratory order from the High Court.

An order for the eviction of AMI Plc would not disturb the appellant and a spoliation order can only be issued against the party that caused the spoliation. The respondent has never alleged that it was deprived of possession by the appellant and has always stated that it was AMI Plc that caused its unlawful ejection. By the time it sought redress, AMI Plc was not in possession. Instead, as the documents would show, it was the appellant that was in occupation of No 15 Lanark Rd. It is for these reasons that the High Court should have granted the *declaratur* being sought by the appellant.

The draft order sought by the appellant in the High Court had the effect of nullifying the eviction order granted by the magistrate. It is apparent from the papers that the appellant did not hold the premises through AMI Plc and consequently the order issued by the Magistrates Court was of no force and effect upon the appellant.

We were informed from the bar that the respondent proceeded to have the appellant ejected from the premises. Counsel for the appellant suggested that this court can issue an order for the reinstatement of the appellant to the premises instead of the interdict. Whilst this Court can issue the *declaratur* that the High Court ought to have issued, I am of the view that the interdict cannot be issued as the eviction was effected.

The Supreme Court is a creature of statute and can only do that which its enabling statute permits. The jurisdictional limits and powers of the court are found in ss 21 and 22 of the Supreme Court Act [Chapter 7:13] which read as follows in relevant part:

“21 Jurisdiction in appeals in civil cases

- (1) The Supreme Court shall have jurisdiction to hear and determine an appeal in any civil case from the judgment of any court or tribunal from which, in terms of any other enactment, an appeal lies to the Supreme Court.
- (2) Unless provision to the contrary is made in any other enactment, the Supreme Court shall hear and determine and shall exercise powers in respect of an appeal referred to in subsection (1) in accordance with this Act.

22 Powers of Supreme Court in appeals in civil cases

- (1) Subject to any other enactment, on the hearing of a civil appeal the Supreme Court—
 - (a) shall have power to confirm, vary, amend or set aside the judgment appealed against or give such judgment as the case may require;
 - (b) may, if it thinks it necessary or expedient in the interests of justice—
 - (i)
 - (ii)
 - (iii)
 - (iv)
 - (v)
 - (vi)
 - (vii)
 - (viii)
 - (ix) take any other course which may lead to the just, speedy and inexpensive settlement of the case;
 - (c) may, if it appears to the Supreme Court that a new trial or fresh proceedings should be held, set aside the judgment appealed against and order that a new trial or fresh proceedings be held.
- (2)

It is clear from the above that the Supreme Court has extensive powers which include the power to amend, vary, confirm or set aside a judgment of a lower court or tribunal. It also has the power to take any course which may lead to the just, speedy and inexpensive settlement of the case.

In *casu*, the appellant was evicted by virtue of an order of eviction which was obtained under circumstances which can only be described as irregular. An order directing that the appellant return to the High Court for appropriate relief in relation to its eviction from the premises would result in the appellant having to institute fresh proceedings for its reinstatement. Such a course, under the circumstances of this case, would merely serve to delay the process as this court has already held that the eviction was irregular. This in my view, is a proper case where this Court may issue an order that the appellant be reinstated in the premises.

With regard to the question of costs, Mr *de Bourbon* argued that the appellant's costs in the court *a quo* should be paid by the respondent on a legal practitioner client scale. It was submitted that in the circumstances of this case, the delay in bringing the application for spoliation more than fourteen or fifteen months after possession had been lost was so gross as to disentitle the respondent the relief sought.

The facts show that there was indeed a considerable delay from the time the respondent claimed it lost possession to the time it approached the Magistrates court for spoliatory relief. Prior to that, it launched a number of applications in the High Court seeking the same relief. The first filed on 2 July 2010 was dismissed. Thereafter it filed other applications, some of which respondent abandoned or did not pursue. The abuse of court process is clear. Its conduct throughout the period that the dispute has been raging deserves censure by this court. An order for costs on the punitive scale in the court *a quo* was warranted.

In the premises the appeal must succeed.

Accordingly it is ordered as follows:

1. The appeal is upheld with costs
2. The judgment of the court *a quo* is set aside and substituted with the following:
 - a) The eviction order granted by the Magistrates Court Harare, in the matter between *Autoband Investments (Private) Limited t/a Trauma Centre v African Medical Investments Plc* under Case No MC 16435/11 be and is hereby declared to be of no force, effect and application as against the applicant.

- b) It is ordered that the applicant be and is hereby restored to possession and occupation of premises known as Stand 2924 Salisbury Township of Salisbury Township Lands situated at Number 15 Lanark Road Belgravia, Harare.
- c) It is ordered that the respondent pays the costs of this application on a legal practitioner client scale.

MALABA DCJ: I agree

GARWE JA: I agree

Mtewa & Nyambirai, appellant's legal practitioners

Venturas & Samkange, respondent's legal practitioners