

REPORTABLE (75)

CONSTANTINE GUVHEYA DOMINIC CHIWENGA
v
MARRY MUBAIWA

SUPREME COURT OF ZIMBABWE
GWAUNZA DCJ, GARWE JA & BHUNU JA
HARARE: MARCH 16, 2020 AND JUNE 25, 2020

L. Uriri with W. T. Manase, for the appellant

S. M. Hashiti with W. Nyamakura & O. Mbuyisa, for the respondent

GWAUNZA DCJ: GARWE JA: BHUNU JA: This is an appeal against the whole judgment of the High Court handed down on 24 January 2020. The appeal seeks to impugn the court *a quo*'s order awarding custody of the parties' three minor children to the respondent upon the separation of the parties.

The appellant also challenges the jurisdiction of the court *a quo*, and the urgency and validity of the interdict granted against him in respect of the parties' disputed properties.

Although the parties were also quarrelling about the respondent's right to access the matrimonial home, that dispute has since been resolved by the court *a quo* in the appellant's favour. That issue consequently falls away.

The respondent has in turn abandoned her claim that the appellant be barred from being heard until he has purged his dirty hands. That issue has also fallen away for the reason that it has been abandoned by the respondent.

CHOICE OF LAW

Although the parties were married under customary law, they have both elected to have their matrimonial rights and obligations regulated and determined in terms of general law¹. It is convenient that their dispute be regulated and determined in terms of general law because of their sophisticated way of life and ownership of immovable private property.

As the concept of private ownership of immovable property is unknown at customary law, it is virtually impossible to determine rights and obligations pertaining to privately owned immovable property in terms of any law other than general law. Thus, the appropriate applicable law in this case is the general law. See *Mandava v Chasekwa*²

BRIEF SUMMARY OF THE CASE.

The appellant is the Vice President of Zimbabwe whereas the respondent is his estranged wife. The two were married under an unregistered customary law marriage also known as a customary law union. The marriage was blessed with three minor children. The eldest Tendai Dominique Chiwenga is aged 9 years whilst Christian Tawanazororo Chiwenga is 8 years and Michael Alexander Tadisiswa Chiwenga is 6 years old respectively.

¹ Section 3 (b) of the Customary Law and Local Courts Act [Chapter 7 : 05]

² 2008 (1) ZLR 300 at 303G

During happier times the parties resided at their matrimonial home situate at number 614 Nick Price Drive, Borrowdale Brooke, Harare together with their three minor children. During the subsistence of the marriage the parties acquired both movable and immovable property either jointly or in their personal capacities. The acquired property includes the matrimonial home, a fleet of cars, immovable business premises known as Orchid Gardens, along the Domboshava Road, personal effects and other paraphernalia.

It however so happened that the marriage later fell on turbulent times resulting in the appellant initiating divorce procedures under customary law. In those proceedings he alleged that he had given her a divorce token known as '*gupuro*'. In her papers before this Court and in para 8.1 of her heads of argument, the respondent continues to hold herself out as the appellant's wife. The divorce issue therefore appears not to have been resolved. The appellant has nevertheless now issued summons against her in the court *a quo* under case number HC 9837/19 claiming custody of the three minor children in terms of s 4 of the Guardianship of minors Act [*Chapter 5:08*] and division of the matrimonial property acquired during the subsistence of the marriage.

The current proceedings and the parties' relationship are severely strained, acrimonious and discordant. This is mainly because of the respondent's arrest on multiple charges of attempted murder of the appellant, fraud, money laundering and contravention of the Exchange Control Regulations.

Upon her arrest, the respondent was detained in custody for a period spanning 3 weeks from 14 December 2019 to 6 January 2020. She went to prison without making proper provision for the custody of their three minor children, possession and administration

of her personal property and effects. At the time of her arrest and detention, the appellant had voluntarily moved out of the matrimonial home. He avers that he returned to the matrimonial home to fill in the void occasioned by the respondent's arrest and detention in custody. In the absence of the respondent, he then assumed *de facto* custody of their three minor children and possession of their matrimonial property including the fleet of cars, Orchid Gardens, personal effects and other paraphernalia. His conduct in this respect was perfectly lawful and undisputed at the material time.

On 6 January 2020, the court *a quo* granted the respondent bail and ordered her to reside at the matrimonial home at her specific instance and request. Upon her release from prison on bail she returned to the matrimonial home to assume residence as ordered by the court *a quo*. State security guards stationed at the home denied her access to the matrimonial home.

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The same scenario played out when she sought access to Orchid Gardens which was also guarded by state security guards. They also denied her access to the premises.

She further alleges that she claimed custody of her three minor children without success, a fact denied by the appellant.

THE RESPONDENT'S CLAIM A QUO

Under the circumstances the respondent submits that she had no option but to approach the appropriate court on an urgent basis for relief. To that end, she lodged an urgent application in the court *a quo* for a 'provisional spoliation order' directing the appellant to

grant her the following interim relief on a *prima facie* basis pending the return date for a final order:

1. Access to the matrimonial home.
2. Access to and use of her personal motor vehicles.
3. Access to her clothing, personal goods and effects.
4. Return of her safes containing her personal property.
5. An order directing the appellant to return the 3 minor children of the marriage to the respondent.
6. An order compelling the appellant to return to the respondent all furniture, goods and effects removed from the business premises at Orchid Gardens.
7. An order denying the appellant access to the court until he has purged his dirty hands.
8. An order directing the Sheriff with the assistance of the police to execute the court *a quo*'s order forthwith.

In the final order the respondent sought the following relief:

1. That the appellant be interdicted and restrained from interfering with respondent's use and enjoyment of the matrimonial home and her business premises at Orchid Gardens, pending the conclusion of the matrimonial proceedings under case number HC 9837/19.
2. That the appellant be restrained from removing the 3 minor children of the marriage from the applicant's custody.
3. That the appellant be ordered to pay costs at the punitive scale as between legal practitioner and client scale.

Though the terms of the provisional and final orders sought are somewhat worded differently, the import and effect of the two orders are materially the same. This is because they both seek to wrestle custody of the three minor children and possession of the disputed property from the appellant and confer them on the respondent.

Basically, the respondent's complaint was that the appellant had abused his office as Vice President of Zimbabwe using soldiers to despoil her of access to the matrimonial home, her children and property.

THE APPELLANT'S DEFENCE A QUO

The appellant objected to the respondent's claim that the matter was urgent. He further questioned the assumption of jurisdiction by the court *a quo* as usurping the function of the Children's Court which is specifically conferred with the jurisdiction in terms of s 5 of the Guardianship of Minors Act [*Chapter 5:08*] to determine the question of custody of minor children when spouses begin to live apart.

He vehemently denied abusing his office as alleged or at all. He denied that the respondent had custody of the minor children and possession of the disputed property when he assumed *de facto* custody of the children and possession of the disputed property while she was in prison.

The appellant denied having given the guards at the matrimonial home and Orchid Gardens any orders to deny the respondent access to the premises. His submission to the effect that he had no control over the guards was not rebutted.

Placing reliance on the South African case of *Fraser v Children's Court, Pretoria North*³, the appellant argued that it was wrong to discriminate against fathers in matters pertaining to the custody of their minor children.

It was his further submission that throughout the whole episode, he acted lawfully as a diligent *pater familias*. At para 3 (c) of his opposing affidavit in the court *a quo*, the appellant makes the valid point that as a responsible parent, he was obliged and duty bound to move into his home and take care of his minor children and family property when the respondent was detained in prison. He averred further that, as the father of the children, he was best suited to have their custody because the respondent was a drug addict and a psychiatric patient.

THE COURT A QUO'S FINDINGS AND DETERMINATION.

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On the basis of the above summation of evidence and arguments the court *a quo* found that:

- (a) the matter was urgent mainly because of the welfare of the minor children. It also found that the matter was urgent because the respondent was arbitrarily evicted from the matrimonial home without a court order. It also found that spoliation matters are, by nature, urgent, and
- (b) notwithstanding that the respondent was in prison, she was unlawfully despoiled of the custody of her children and property.

The court *a quo* proceeded to make the following final order despite the fact that the respondent had asked for a provisional order on a *prima facie* basis:

³ 1997 (2) SA 261

- “1. The respondent (*Constantino*) is hereby ordered to restore custody of the minor children namely, *Tendai Dominique Chiwenga* (Born 4 November 2011), *Christian Tawanazororo Chiwenga* (Born 5 November 2012) and *Michael Alexander Tadiswa Chiwenga* (Born 13 February 2014) to the custody of the applicant (*Marry*) within 24 hours of this order
2. The respondent (*Constantino*) is hereby interdicted and restrained from interfering with applicant’s (*Marry*) access to, use and enjoyment of the property known as 614 Nick Price Drive, Borrowdale, Borrowdale, Harare.
3. The respondent (*Constantino*) is hereby interdicted and restrained from interfering with applicant’s (*Marry*) access to, use and enjoyment of the property known as Orchid Gardens Domboshawa, Harare.
4. The respondent (*Constantino*) is hereby interdicted and restrained from interfering with applicant’s (*Marry*) access to, use and enjoyment of the motor vehicles, namely Toyota Lexus, Mercedes Benz S400, Mercedes Benz E350 (Black).
5. Respondent (*Constantino*) is interdicted and restrained from interfering with applicant’s (*Marry*) access and or possession of her clothing.
6. The respondent (*Constantino*) is ordered to pay applicant’s (*Marry*) costs of suit.”

GROUND OF APPEAL AND ISSUES FOR DETERMINATION

Aggrieved by the above order, the appellant appealed to this Court on 8 10 grounds of appeal which in fact raise only three issues for determination by this Court on appeal. It is cumbersome to regurgitate all the 10 grounds of appeal. It is however convenient to dwell on the three issues raised by the grounds of appeal. These are;

1. Whether the court *a quo* correctly determined that the matter was urgent.
2. Whether or not it was competent for the court *a quo* to grant a final interdict when the respondent had asked for a ‘provisional’ spoliation order.
3. Whether the court *a quo* had jurisdiction to determine the question of custody of the 3 minor children in light of the provisions of s 5 of the Act.

APPLICATION OF THE LAW TO THE FACTS.

Whether the court *a quo* correctly determined that the matter was urgent

As previously stated, the court *a quo* found that the application was urgent on the basis that it involved the welfare of minor children and that spoliation matters are generally treated as urgent. Placing reliance on the well-known case of *Kuwarega v Registrar General and another*,⁴ the learned judge *a quo* made a factual finding that the matter was urgent and could not wait in the queue of ordinary cases. It is trite that such a factual finding involving the exercise of discretion can only be upset based on irrationality. See *Barros and Another v Chimuponda*⁵.

It is common knowledge that minor children are a vulnerable class of persons under the special care of the High Court as their upper guardian. The same applies to spoliation, a remedy designed to avert self-help in a democratic civilized society. The remedy forbids the law of the jungle where survival of the fittest reigns supreme. Thus, the courts will quickly come to the aide of the vulnerable and the weak to restore custody and possession where one is unlawfully deprived of the same by the strong and valiant.

In this case the respondent approached the court *a quo* complaining that she had been unlawfully deprived of the custody of her children and possession of her property by her powerful husband abusing state power. That being the case, the court *a quo* cannot be faulted for granting her application for an urgent hearing. Doing otherwise would have amounted to abdicating its duty as the upper guardian of minor children and protector of the weak and vulnerable. In any case, an application for spoliation is generally treated as urgent because of the need to stop unlawful conduct pending the determination of the parties' competing rights.

⁴ 1998 (1) ZLR 188

⁵ 1999 (1) ZLR 58 (S)

Looked at differently, an order granting the urgent hearing of a matter is generally not appealable. This is for the simple reason that the order has no bearing on the merits of the application or judgment. This is akin to a bank customer who is rightly or wrongly allowed to jump the queue. His or her transaction cannot be impugned or rendered unlawful solely on the basis that he or she has jumped the queue. By the same token a correct judgment cannot be impugned or rendered incorrect by the mere fact that the matter was improperly heard as an urgent application.

In *Nyakutombwa Mugabe Legal Counsel v Mutasa & Ors*⁶ this Court held that a finding of urgency by a court on its own cannot constitute a substantive ground of appeal. Thus the appeal against urgency was ill conceived and misplaced.

The court therefore finds no merit in the appellants' complaint that the matter was improperly heard as an urgent matter. The court now turns to determine the appeal on the remaining two issues.

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WHETHER OR NOT IT WAS COMPETENT FOR THE COURT A QUO TO GRANT A FINAL ORDER IN THE FORM OF AN INTERDICT?

Despite the respondent having asked for a 'provisional' spoliation order based on a *prima facie* case, the learned judge in the court *a quo* went on to grant an interdict which neither party had asked for nor pleaded. The two critical questions to be answered are:

1. Was it competent at law for the court *a quo* to grant the respondent a final order when her claim was for a 'provisional' spoliation order? In any case was the provisional order sought a competent remedy?

⁶ SC 28/18 at p 8

2. What were the parties' rights of custody of their three minor children at the time of separation?

The court now proceeds to deal with the two questions in turn.

Whether it was competent at law for the court *a quo* to grant the respondent an interdict when she had asked for a 'provisional' spoliation order?

In answering this question, it is necessary to set out the applicable law in some detail as it is apparent that both the court *a quo* and the respondent's legal practitioners were labouring under some serious misapprehension of the law in this regard.

THE APPLICABLE LAW

The answer to this question is a well beaten path at home, regionally and abroad. In this judgment the word 'injunction' is used interchangeably with the term '*interdict*' with reference to English and Roman Dutch Law, respectively.

The respondent approached the court *a quo* seeking a 'provisional' spoliation order on a *prima facie* basis. It is however trite that a spoliation order being final in effect cannot be granted as an interim order on the evidence of a *prima facie* right, as happened in this case. See *Blue Ranges Estates (Pvt) Ltd v Muduviri & Anor*⁷. On this basis, the respondent's quest for a 'provisional' spoliation order, was misplaced and bad at law. The court expects legal practitioners to place before it, cases that are founded on sound substantive and procedural law. The court cannot and should not be expected to make a case

⁷ 2009 (1) ZLR 370 at p 377D

for the parties. Its role is to determine the dispute put before it, on the basis only of the applicable law and procedure.

The definition and purpose of a provisional order is diametrically different from that of a final order. C. B Prest in his book, *The Law and Practice of Interdicts*⁸ defines and explains the purpose of a provisional order as follows;

“A provisional order is a remedy by way of an interdict which is intended to prohibit all *prima facie* illegitimate activities. By its very nature it is both temporary and provisional, providing (*interim*) relief which serves to guard the applicant against irreparable harm which may befall him, her or it, should a full trial of the alleged grievance be carried out. As the name suggests, it is provisional in nature, as the parties anticipate certain relief to be made final on a certain future date upon which the applicant has to fully disclose his, her or its entitlement to a final order that the interim relief sought was ancillary to”

In the South African case of *Development Bank of Southern Africa (Ltd) v Van Rensburg NO and Ors*⁹ the court clarified that its purpose is to preserve the status quo pending the return day.

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Australia has intrinsically the same definition and purpose. In *Re Brian Charles Gluestein; Ex parte Anthony*¹⁰ the court said:

“Relatively, the purpose of an interlocutory *injunction* is to preserve the position until the rights of the parties can be determined at the hearing of the suit. A plaintiff seeking an interlocutory injunction must be able to show a sufficiently arguable claim to a right to the final relief in aid of which the interlocutory relief is sought.”

Under English law, the law remains virtually the same. In *Attorney General V Punch Limited and Anor*¹¹, the court held that:

⁸ 9th ed Juta & Co (Pty) Ltd p2

⁹ [2002] 3 All SA 669 (SCA)

¹⁰ [2014] WASC 381

¹¹ [2002] UKHL 50

“The purpose for which a court grants an interlocutory injunction can be stated quite simply. In *American Cyanamid Co v Ethicon Ltd*¹² LORD DIPLOCK described it as a remedy which is both temporary and discretionary. Its purpose is to regulate, and where possible to preserve, the rights of the parties pending the final determination of the matter which is in issue by the court.”

The purpose of a provisional order is the same in our jurisdiction as in the other jurisdictions stated above. The purpose of a final order is different from that of a provisional order in that a final order is conclusive and definitive of the dispute. It finally settles the issues and has no return date. Once a final order is given the court issuing the order becomes *functus officio* and it cannot revisit the same issues at a later date.

It is settled law that the standard of proof for a provisional order is different from that of a final order. A provisional order is established on a *prima facie* basis because it is merely a caretaker temporary order pending the final determination of the dispute on the return date. The parties have an opportunity to argue the matter again on the return date.

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On the other hand a final order is obtained on the higher test of a clear right because it is final and definitive as it has no return date.

It so happens that lawyers often seek a final order disguised as a provisional order as happened in the well-known case of *Blue Ranges Estates (Pvt) Ltd v Muduviri & Anor*¹³ and in this case. That case lays down the test for distinguishing a provisional order from a final order despite the presentation of a final order disguised as a provisional order. In that case MALABA DCJ as he then was had this to say at p 376:

¹² [1975] AC 396, 405D

¹³ 2009 (1) ZLR 368

“To determine the matter one has to look at the nature of the order and its effect on the issues or cause of action between the parties and not its form. An order is final and definitive because it has the effect of a final determination on the issues between the parties in respect of which relief is sought from the court...

For an order to have the effects of an interim relief it must be granted in aid of, and as ancillary to the main relief which may be available to the applicant on final determination of his or her rights in the proceeding.

... The test is whether the order made is of such a nature that it has the effect of finally determining the issue or cause of action between the parties such that it is not a subject of any subsequent confirmation or discharge.”

In the South African case of *Pretoria Racing Club v Van Pietersen*¹⁴ SMITH J

had occasion to remark that:

“In order to decide whether such an order is final or not I think the test must be arrived at by considering what the object of the proceedings is as a matter of substance. See the Judgment of ROMER LG in *RE Herbet Reeves & Co* [1902] 1 Ch 29”

The respondent’s object and purpose in filing the urgent chamber application was to obtain custody of her minor children, access to the matrimonial home and repossession of the disputed property. It is self-evident that the interim relief she sought was crafted in such a way that if granted she would get the primary relief sought. Through the interim relief she would have obtained access to the matrimonial home, custody of her children and disputed property. Such an order does not fit the definition of an interim order. It is nothing other than a final order disguised as a provisional order.

The learned judge *a quo*, perhaps having realised that the interim order sought fitted the definition of a final order, apparently threw caution to the wind and granted a final order that had not been sought by the respondent. By going on a frolic of his own and

¹⁴ 1917 TS 687 at 697

determining issues not placed before him, the learned judge fell into grave error and misdirected himself.

The net result was that the respondent was granted a final interdict when she had asked for a provisional order after pleading a *prima facie* right.

In *Nzara & Ors v Kashumba NO & Ors*¹⁵, this Court held that:

“It is clear from the court a quo’s orders that some of the orders it granted had not been sought by the other party. It is also clear that parties had not made any submissions for and against those orders. They were granted mero motu by the court a quo. It did so without seeking the parties’ views on those orders. There is no doubt that the court a quo exceeded its mandate which was to determine the issues placed before it by the parties through pleadings and proved by the evidence lead.

The function of the court is to determine the disputes placed before it by the parties. It cannot go on a frolic of its own. Where a point of law or a factual issue exercises the court’s mind but has not been raised by the parties or addressed by them either in their pleadings, in evidence or in submissions from the bar, the court is at liberty to put the question to the parties and ask them to make submissions on the matter”

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It is therefore settled law that a judicial officer is strictly bound by the issues pleaded by the parties. Going on a frolic of his/her own and determining issues not pleaded or raised by the parties constitutes a fatal procedural irregularity.

When this is taken together with the fact that the respondent sought relief that was incompetent at law, in respect of her claims to property and custody of the children, there can be no doubt that the entire proceedings before the court *a quo* were a nullity *ab initio*. The appropriate remedy would therefore, have been to strike out the entire chamber application without any further ado.

¹⁵ SC 18/18 at p11

The issue concerning the custody of the three minor children however calls for further comment. This is in view of the supremacy of the doctrine of the best interests of minor children, *vis a vis* the incompetent procedure adopted by the respondent in seeking custody of her children

CUSTODY OF THE THREE MINOR CHILDREN

The respondent's claim was for a 'provisional' spoliation order for the repossession of custody of her 3 minor children and property allegedly forcibly and unlawfully taken away from her by the appellant against her will.

The appellant questioned the jurisdiction of the court *a quo* to entertain the issue of custody given that s 5 of the Guardianship of Minors Act [Chapter 5:08] ('the Act') specifically confers jurisdiction on the Children's Court in matters of this nature. It is however pertinent to note that, although the Children's Court is conferred with the jurisdiction to determine the question of custody upon separation of a child's parents, the High court as the upper guardian of all minors¹⁶ has overall inherent jurisdiction at every stage during the child's minority. This is because the section does not expressly oust the jurisdiction of the High Court. Ordinarily it retains its inherent jurisdiction to hear and determine matters of this nature at its discretion. Where however the proceedings before the court are a nullity, the court is stripped of its jurisdiction over the matter. It cannot therefore use the supremacy of the best interests of the children to found jurisdiction to grant spoliatory relief as happened in this case.

¹⁶ Section 81 (3) of the Constitution as read with s 9 of the Guardianship of Minors Act [Chapter 5:08]

The court notes in passing that the application makes no distinction between the recovery of custody of the minor children and repossession of property. It treats children as if they were pieces of property that can be the subject of a spoliation order. Biblical Solomonic wisdom, however, instructs that a child cannot be treated as common property in a tussle for custody between adults. For that reason, the law maker has laid out elaborate laws and procedures for the regulation of issues to do with custody and guardianship of minor children. The applicable law regulating the custody of children where their parents begin to live apart is to be found under s 5 of the Guardianship of Minors Act. There was thus no call for the respondent to reach beyond and outside this law, to found a claim for custody of her children.

The section provides as follows:

5 Special provisions relating to custody of minors

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- (1) Where either of the parents of a minor leaves the other and such parents commence to live apart, the mother of that minor shall have the sole custody of that minor until an order regulating the custody of that minor is made under section four or this section or by a superior court such as is referred to in subparagraph (ii) of paragraph
 - (a) of subsection (7).
- (2) Where —
 - (a) the mother of a minor has the sole custody of that minor in terms of subsection (1); and
 - (b) the father or some other person removes the minor from the custody of the mother or otherwise denies the mother the custody of that minor; the mother may apply to a children's court for an order declaring that she has the sole custody of that minor in terms of subsection (1) and, upon such application, the children's court may make an order declaring that the mother has the sole custody of that minor and, if necessary, directing the father or, as the case may be, the other person to return that minor to the custody of the mother,

(Our emphasis)

Thus the section automatically confers custody of the minor children on the respondent by operation of law when she began to live apart from the appellant. There is therefore no truth in the respondent's averment in para 10.3 of her founding affidavit that she had no alternative remedy. Section 5 of the Act clearly provides a less onerous remedy heavily weighted in her favour. It was therefore remiss and the height of folly for counsel for the respondent to rely on the inappropriate law of 'provisional' spoliation to claim custody of the minor children.

One difficulty with the respondent's claim for custody under spoliation, misguided though it was, is that in this Court she recanted and retracted her earlier accusation that the appellant had unlawfully abducted the three minor children from her. By the same token she withdrew her allegation that the appellant had approached the court with dirty hands.

These concessions mean that the appellant did not unlawfully dispossess the respondent of the custody of the three minor children. The retraction just referred to is consistent with the appellant's defence that he did not unlawfully dispossess the respondent of the custody of the children. The concessions therefore absolve the appellant of any wrongdoing regarding the manner in which he assumed custody of the minor children and disputed property. The allegation that the appellant abused his position as vice president is therefore misplaced and without foundation.

The requirements for a valid spoliation claim are well known as spelt out in *Botha and Another v Barret*¹⁷ where the learned Chief Justice GUBBAY had occasion to remark that:

“It is clear law that in order to obtain a spoliation order, two allegations must be made and proved. These are:

- (a) That the appellant was in peaceful and undisturbed possession of the property and
- (b) That respondent deprived him of the possession forcibly or wrongfully against his consent”.

The respondent’s claim under spoliation falters at the very first test in that the remedy seeks to protect possession of property in the main and not human beings. Secondly, unlawful dispossession being a necessary ingredient of the delictual claim of spoliation, the admitted absence of wrongful dispossession left the respondent with no leg to stand on.

Despite the ineptitude of her legal practitioners in choosing to rely on an inappropriate procedure, the law however remains on her side as it automatically confers the custody of the minor children on her without any further ado. As the law stands, upon separation from the appellant, the respondent automatically acquires custody of her minor children by operation of law until the courts determine otherwise. The realisation and enjoyment of that right was however negated by the respondent’s lawyers who adopted a completely wrong procedure rendering the proceedings a nullity *ab initio*.

Both s 5 of the Act as read with s 81 (2) of the Constitution provide for the supremacy of the best interests of the minor child. As we have already seen, the Act provides that where the parents of a minor child begin to live apart, the custody of the minor child

¹⁷ 1996 (2) ZLR 77(S) at p79

shall be with the mother. What this means is that the law presumes that at the time of separation it is in the best interest of the child that its custody be with the mother until the contrary is proved in a competent court. That is however a rebuttable presumption.

The supremacy of the best interest of a child means that the appellant was within his rights in challenging the suitability of the respondent as a custodian parent of the minor children. He challenged the respondent's suitability as a custodian parent on two main grounds. Firstly, that she was a drug addict who practised black magic and secondly, that she was a psychiatric patient. The appellant was entitled to raise these concerns which however needed to be probed before an appropriate order based on the merits and direct empirical evidence, could be made.

The difficulty with the respondent's case in the court *a quo* was that she did not claim custody of her children under s 5 of the Act. She instead, for no good reason and at the instance of her lawyers, claimed custody of her children under the non-existent and inapplicable law of 'provisional' spoliation. As already stated, the learned judge in the court *a quo*, presumably having realised that the respondent's claim was incompetent and a nullity at law, improperly granted her a final interdict which she had not asked for. The order cannot stand.

However, now that the matter is pending in the court *a quo* under s 4 of the Act, the issue of the custody of the three minor children is best left to that court for a substantive determination on the merits after hearing evidence.

DISPOSITION

In granting the respondent a final interdict which she had not asked for in respect of her claims, the learned judge *a quo* fell into grave error and misdirected himself. Firstly, because he had neither the jurisdiction nor the discretion to award the respondent relief that she had not asked for. A judicial officer who acts without jurisdiction acts without authority and to that extent illegally.

The court was at fault in that it determined a matter that was not before it and without hearing argument on the question of whether or not to grant a final interdict. The matter that was before it was whether or not to grant the ‘provisional’ spoliation order. The question of the final interdict was supposed to be argued and determined on the return day which however, never saw the light of day. Once the court *a quo* realised that the respondent’s claim was fatally defective, it was duty bound to strike it off the roll. In determining the issue *mero motu* without hearing argument from both parties the court *a quo* was in fundamental breach of the *audi alteram partem* rule which forms the backbone of our adversarial legal system.

Secondly, at law a ‘provisional’ spoliation order is incompetent as relief for the acquisition of a final interdict. This is because a final interdict cannot be founded on a ‘provisional’ spoliation order which is in itself a nullity at law. You cannot put something on nothing, as it will collapse. (See *Mcfoy v United Africa Co. Ltd*)¹⁸

Finally, it was incompetent to seek custody of minor children through spoliation proceedings to the exclusion of clear statutory provisions under s 5 of the Act.

¹⁸ [1961] 3 All ER 1169 At p 1172 (PC)

On the other hand, it appears that the learned judge *a quo* was overwhelmed by the status of the appellant as Vice President of the country and the intensity of the conflict. His vision was apparently clouded by the dust of the conflict, prompting him to wade into its murky waters in aid of the respondent, and granting her relief that she had not asked for. Such conduct was injudicious and an affront to the time honoured tenets of justice, fairness and equality before the courts. In the absence of any evidence of abuse of office, the appellant ought to have been treated like any other citizen before the court *a quo*.

It is plain from the above summation of the facts and analysis of the law that, although the respondent may have had a meritorious case, she unfortunately did not get the benefit of sound legal advice in order to assert her rights. Regrettably this is the sort of case where one cannot escape the consequences of the conduct of his/her legal practitioner.

As the respondent's claim was incompetent and a nullity at law the court *a quo* ought to have found that the application was not properly before it and struck the matter off the roll.

COSTS

It is trite that costs follow the results. In this case there were 3 substantive issues for determination being:

1. Access to the matrimonial home.
2. Possession of the disputed properties.
3. Custody of the 3 minor children.

The appellant has succeeded on two of the issues that arose for determination in this appeal whilst the respondent has succeeded on the inconsequential procedural issue of urgency.

The respondent's conduct in presenting an incompetent claim and her unsubstantiated attack on the appellant's character could have justified an order for punitive costs against her. However, in light of the fact that she did not get appropriate legal advice and representation from her lawyers, the court takes the view that an order of costs on the higher scale would be unduly harsh.

It is accordingly ordered as follows:

1. The appeal succeeds in part, with costs.
2. The appeal against the finding of the court *a quo* on urgency be and is hereby dismissed.
3. Subject to paragraph 2 above, the judgment of the court *a quo* is set aside and substituted with the following:

“The matter be and is hereby struck off the roll with costs.”

Manase and Manase, the appellant's legal practitioners.

Mtewa and Nyambirai, the respondent's legal practitioners.