

**DISTRIBUTABLE (62)**

(1) GATEWAY PRIMARY SCHOOL (2) KM RICQUEBOURG  
N.O (3) GATEWAY PRIMARY SCHOOL PARENTS ASSOCIATION  
v  
(1) MARINDA FENESEY (2) THE SHERIFF OF ZIMBABWE

**SUPREME COURT OF ZIMBABWE  
HLATSHWAYO, GUVAVA & BHUNU  
HARARE: 13 MARCH 2018 & 24 MAY 2021**

*L. Madhuku*, for the appellants

*C. Daitai*, for the first respondent.

**BHUNU JA:** The appellants are appealing against the entire judgment of the  
Judgment No. SC 63/21  
High Court delivered on 24 May 2017 under judgment number HH 529/17. That judgment  
Civil Appeal No. SC 1034/17  
REF. CASE NO. HC 4249/17  
granted the respondent a provisional spoliation order in the following terms:

**“TERMS OF THE FINAL ORDER SOUGHT**

That you show cause to this Honourable Court why a final order should not be made in the following terms:

1. The first, second and third respondents be and are hereby interdicted from interfering in any manner with the applicant’s business operations at the tuck shop situated at Gateway Primary School. Including but not limited to barring her potential customers from buying from the tuck shop.
2. The first, second and third respondents be and are hereby ordered not to unlawfully evict the applicant from the tuckshop at Gateway Primary School.
3. The first, second, and third respondents to pay costs at an attorney and client scale, the one paying and the others to be absolved.

**INTERIM RELIEF GRANTED**

Pending confirmation or discharge of the provisional order, the applicant is granted the following relief:

1. The first, second and third respondents be and are hereby ordered to remove their additional locks at the tuck shop at Gateway Primary School upon service of this order and take all necessary steps to ensure that the applicant’s peaceful and undisturbed occupation of the tuck shop is restored failing which the fourth respondent be and is hereby authorised to remove the locks above said.

2. The second applicant (*sic*) be and is hereby ordered to publicly and at an assembly reverse the order he imposed on school pupils and teachers not to buy at the applicant's tuck shop at Gateway Primary School.
3. The applicant's legal practitioners are hereby given leave to serve the order on the respondents."

The appeal is strenuously opposed by the respondent.

The facts giving rise to the appeal are to a large extent common cause. It is however convenient to give a brief resume of the material facts of this case at this juncture. The undisputed facts are that the first appellant is a primary school whereas the second appellant is its headmaster and overall administrator. The third appellant is the School's Parents Association capable of suing and being sued in its own name. It assists in the smooth running of the school. Among other functions it generally manages the tuckshop.

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The third appellant leased out the school tuckshop to the first respondent as its statutory tenant sometime in 2011. The lease agreement was subsequently renewed from September 2016 to September 2017. On 5 February 2017 the Chairman of the Parents' Association Committee wrote to the first respondent giving her two months' notice of its intention to terminate the lease agreement with effect from 6 April 2017. The letter reads:

"Dear Marinda

**Notice of Termination of lease contract**

We refer to the tuck shop lease agreement which was renewed in September 2016 expiring on 8 September 2017. We regret to advise that after much deliberation and thought, the parents Association Committee hereby gives you notice of their intention to terminate the lease agreement (without renewal) with yourself with effect from the end of the first term. Our notice period is therefore effective from 6 February until 6 April 2017.

We thank you for your tenancy over the many years with the Gateway Community as well as the rent payments that have always been on time.

We trust that this is sufficient notice for you to make the necessary arrangements. If you have any further queries, please do not hesitate to contact the under signed."

Aggrieved by the intended termination of her tenancy of the tuckshop, the first respondent consulted her lawyers who took the view that the notice was a legal nullity. They accordingly wrote to third appellant on 5 April 2017 challenging the lease termination on the grounds that the notice period was inadequate and that it did not provide good and sufficient reasons for the termination.

Unperturbed by the threatened legal challenge to its notice to terminate the lease agreement, the third appellant proceeded to execute its cancellation of the lease agreement in terms of its written notice of 5 February 2017. The validity of the termination of the first respondent's lease and tenancy of the disputed property is hotly contested.

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It is however common cause that schools closed on 6 April 2017 and the parties proceeded on end of term school holidays, during which period the tuckshop was closed. The point of departure is the circumstances surrounding the closure of the tuckshop and its reopening at the end of the school holidays in May 2017.

The first respondent's version in her founding affidavit is that at the end of term she locked her tuckshop and went away without any event. During the holidays she fully restocked her tuckshop in anticipation of the reopening of the school. Upon her return on 9 May at the end of the school holidays, she unlocked the tuckshop only to discover that the second respondent had issued orders banning her customers, mainly teachers and students from buying anything from the tuckshop. Guards were posted at the tuckshop to enforce the ban.

On 10 May 2017 she found herself locked out of the tuckshop. Additional locks had been placed on the entrance door by the appellants acting in concert and common purpose. It was her case that by locking her out the respondents were unlawfully violating her peaceful and undisturbed possession of the tuck shop hence her urgent application for a provisional spoliation order for relief.

On the other hand, the respondents in their opposing affidavit deposed to by third appellant's Chairman one Justice Marwisa denied ever locking the first respondent out of the tuckshop as alleged or at all. He deposed that when given notice of termination of the lease agreement the first respondent agreed and voluntarily cleared the tuckshop and left without any problem on 6 April 2017. Accordingly he denied that the first respondent was in peaceful and undisturbed possession of the tuckshop when the true owners of the tuckshop, Gateway Trust recovered possession of the tuckshop. In short the appellants' case is that the first respondent voluntarily surrendered possession of the tuckshop to the lessor.

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The learned judge in the court *a quo* believed the first respondent and disbelieved the appellants. He found in her favour that she was in peaceful and undisturbed possession of the tuck shop prior to the unlawful dispossession, much to the chagrin of the appellants, hence this appeal.

The appellants raised the following grounds of appeal:

1. The learned judge in the court *a quo* erred at law and in fact in failing to find that first respondent was not in peaceful and undisturbed possession of the tuckshop at the time of the alleged closure of the tuckshop. This requirement of spoliation was not established.

2. The learned judge in the court *a quo* erred at law in finding that the deprivation of the tuckshop amounted to unlawful deprivation since the first appellant was given notice of termination of the lease.
3. In the alternative the learned judge in the court *a quo* grossly misdirected himself at law in failing to exercise his discretion not to grant the order sought given the circumstances of the matter that the continued operation of the tuckshop was not in the best interest of the children.

Although the appellants raised 3 grounds of appeal, there is in reality one cardinal issue for determination. The primary issue advanced for determination is whether or not the respondent was in peaceful and undisturbed possession of the tuckshop prior to the alleged unlawful dispossession. The last two grounds of appeal are mere make weights which add no value or cogency to the appeal. Although there are apparent material disputes of fact no one has complained that they were incapable of resolution on the basis of the papers filed of record. The learned judge in the court *a quo* was therefore correct in disposing of the matter before him on the basis of the papers filed of record.

While preparing this judgment it however occurred to me that a vital legal issue upon which the resolution of this appeal revolves was omitted. The crisp issue omitted for consideration is, **“whether an interdict having the effect of a final order can be sought through a provisional order?”**

Both Counsel for the appellants and the first respondents have since filed useful supplementary heads of argument at the court’s special instance and request. They are

agreed that a spoliation order being a form of a final interdict cannot be granted as a provisional order. It can only be granted as a final order.

Undoubtedly both counsels are correct in their appreciation of the law in this respect. The leading case on this settled point of law is *Blue Rangers Estates (Pvt) Ltd v Muduvuri & Anor* 2009 (1) ZLR 368. That case is authority for the proposition that a spoliation order being a final and definitive order cannot be granted as a provisional order.

That being the case, it follows that the respondent erred and strayed into the realm of illegality when it sought a spoliation order in the form of a provisional order. Consequently, the court *a quo* also erred and fell into grave error when it granted the first respondent a provisional spoliation order contrary to the dictates of the law.

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While admitting that the provisional order granted by the court *a quo* is totally defective, the first respondent has implored this Court to come to its rescue by resort to the court's powers under s 22 (1) of the Supreme Court Act [*Chapter 7:13*] in the interests of justice. The relevant parts of the section relied upon provide as follows:

**“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) ...
    - (ix) take any other course which may lead to the just, speedy and inexpensive settlement of the case;”

On a proper reading of s 22 of the Act, it is clear that it confers no power of substitution on the court. It can only confirm, vary, amend or set aside the judgment appealed against or give such judgment as the case may require. The power, “*to give such judgment as the case may require*” is in my view not an open cheque for the court to go on a frolic of its own giving any judgment it desires. That power is confined to what it is authorised to do under s 22. As the power of substitution is not given under s 22 of the Act, the court cannot exercise such power. If it does, it acts without jurisdiction. That being the case this court cannot substitute a final order for a provisional order. By the same token both the court *a quo* and this Court cannot give the respondent a relief that she did not ask for in the court *a quo*. It is now settled law that a court has no jurisdiction to determine issues not placed before it because it is bound by the pleadings. It cannot go on a frolic of its own. See *Nzara & Ors v Kashumba NO & Ors*<sup>1</sup>

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Section 22 (1) (b) (ix) is a procedural section which does not give any substantive relief. Reliance on it for the granting of a final order in place of the provisional spoliation order granted by the court *a quo* is therefore misplaced and untenable at law.

In the final analysis the urgent chamber application being fatally defective, the appeal can only succeed. It is accordingly ordered that:

1. The appeal succeeds with costs.
2. The whole judgment of the court *a quo* be and is hereby set aside and in its place, the following be substituted:

“The urgent application for a provisional spoliation order be and is hereby dismissed with costs”.

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<sup>1</sup> SC 18/18 at p11

**HLATSHWAYO JA** I agree

**GUVAVA JA** I agree

*Mundia & Mudhara*, appellant's legal practitioners.

*Magwaliba & Kwirira*, 1<sup>st</sup> respondent's legal practitioners.

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