NGONIDZASHE GUMBO
versus
ZIMBABWE ANTI-CORRUPTION COMMISSION

HIGH COURT OF ZIMBABWE
MWAYERA J
HARARE, 3 March 2016 and 27 April 2016

Opposed Application

T K Hove, for the applicant
LT Muradzikwa, for the respondent

MWAYERA J: The applicant approached the court on 29 September 2015 with an application for spoliation claiming return of motor vehicles namely (1) Isuzu KB 300 D Tech Isuzu KB 300 D Tech Reg ABE – 984I black in colour, Mercedes Benz ML 350, registration number ABE 0089 – Metallic Blue in Color. The applicant was employed by the respondent as the Chief Executive Officer. On or about 18 March 2013, the applicant was arrested by the Zimbabwe Republic Police on allegations of fraud. On or about 29 July 2014 the respondent with the assistance of the police officers took into their possession the Isuzu and Mercedes Benz mentioned above. The applicant argued that the respondents actions were illegal and constitute despoliation in the following manner:

a) That the applicant was in lawful and undisturbed possession of the motor vehicles.
b) That the respondent without a court order or lawful authority and under threat or violence unlawfully despoiled the applicant of the property.
c) That the respondent had no lawful right or excuse to take the said property that is motor vehicles.
d) That there is no other remedy available to the applicant.

The respondent opposed the application on the basis that the applicant was not in lawful possession of the motor vehicles since he had been recalled by the president's office as at 14

March 2013 and also that the vehicles in question were pool vehicles which would be recalled at any stage. The respondent argued that the applicant surrendered the vehicles freely. In applications of this nature all that the applicant has to prove is that he was in peaceful and undisturbed possession of the property and that he has been unlawfully deprived of such possession. The learned authors Silberberg and Schoeman in "*The Law of Property*" 2nd ed at pp 135 – 136 remarked

> "The applicant in spoliation proceedings need not even allege that he has a *ius possidendi* …….. All that the applicant must prove is that he was in peaceful and undisturbed possession at the time of the alleged spoliation and that he was illicitly ousted from such possession……."

See also *Oglodzinski* v *Oglodzinski* 1976 (4) SA 273, *Nienaber* v *Stuckey* 1946 A.D 1049 and *Kaveri (private) Limited and Aron* v *Mujasi* HC 824/07.

It is important in considering the circumstances of each case for one to consider the rational behind an order of spoliation which was ably set out. In *Chisveto* v *Minister of Local and Town Planning* 1984 ZLR (1) 248 where Reynold J as he then was quoted with approval he remarks by Innes CJ in *Nino Bonins* v *Delonge* 1906 120 at p 122 that:

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

It is abundantly clear that once the requirements of spoliation that one was in peaceful and undisturbed possession and that they have been unlawful disposed are met then the *status quo ante* has to be restored. The merits of the case, that is rights of the parties with respect to the property are not central and are never considered in a possessory suit. What lies from consideration is whether or not a person in possession that is in physical control has been despoiled. See the case of *Bonga and Anor* v *Zaweed* Ors SC 54/14.

In casu the applicant as an employee of the respondent was in physical control of the vehicles in question. The vehicles were allocated to him by the respondent his employer. He was thus in lawful peaceful and undisturbed possession. The respondent counsel conceded that when the respondent took possession of the vehicles on 29 July 2014 the respondent did not have a court order. This set of circumstances would on the face of it constitute spoliation. However, in the circumstance of this case given the employment contract that existed between the applicant

and the respondent and the manner in which the vehicles were taken back or repossessed by the respondent one cannot impugn unlawful and forceful dispossession p 6 of records annexure A form of indemnity written by the applicant on 29 July 2014 gives the impression the applicant surrendered the vehicle to the police and the respondent employees. The indemnity form is in long hand written out by the applicant and witnessed by one Majachani and Tichawona. If the applicant surrendered the vehicles, given the background information that he had been recalled and that he was under criminal investigation for fraud to impute illicit deprivation would not be anchored on circumstances of the case. At least as discerned from papers there appears to have been a hand over of the motor vehicles as opposed to unlawful, wrongful and forceful dispossession of the property in question. It appears from papers the applicant agreed to the repossession of the vehicles as reflected not only in the indemnity form but in the totality of the evidence. The vehicles were repossessed on 29 July 2014 and the applicant only approached this court with an application for spoliation on 29 September 2015 more than a year later. I am alive to the reasoning in *Manga* v *Manga* 1991 (2) ZLR 251 SC wherein Gubbay CJ opined as follows:

> "I am satisfied that in *casu* a delay of five months cannot be regarded as consistent only with acquiescence on the part of the applicant in the dispossession. Nor was the delay so extensive as to disable the court *a quo* from granting any practical relief."

I agree with the sentiments that delay in taking action to the remedy of mandament *Van Spolie* on its own cannot militate against grant of the remedy. The circumstances of each case however, have to be holistically viewed. In Manga case the respondent sought to rely on the delay only as acquiesce to spoliation. In the present case it is clear the applicant surrendered the vehicle in the absence of a court order given the employer – employee relationship. The applicant took more than a year to seek redress. The delay when viewed in conjuction with the surrender of vehicles in the absence of force can be read as acquiesce to the dispossession. The circumstances depicted remove the aspect of unlawful dispossession to the extent of disabling the court from granting a practical relief.

See *Best of Zimbabwe Lodges (Pvt) Ltd and Another* v *Croc-Ostrich Breeders of Zimbabwe (Pvt) Ltd* HH 06/03. It was remarked:

> "It is conceivable that the delay of an applicant to bring the petition either confirms or displays a state of mind in which the applicant acquiesced in the alleged disturbance of his

possession, and in such an event, I am satisfied that he would not be entitled to a mandament *Van Spolie*"

In this case the applicant seems to have agreed to have vehicles taken away and his inaction for more than a year seems to confirm the dispossession was not illicity. Also as conceded by both counsel the matter appeared hinged on a contractual dispute which could not be fully ventilated on paper. To then seek the remedy of mandament *van spolie* to settle a contractual dispute would be incompetent in the circumstances see the case of *Parker* v *Mobit Oil of Southern Africa P/L* and *First Rand Ltd* v *Schdtz No* (2006) SCA 98 RSA.

In the *Parker* case, *Parker* conceded that the possession of the equipment would be of no use to him and had merely sought its possession as a way of enforcing the contract between him and the respondent. In *casu* the applicant conceded he was recalled in 2013 by the president's office and that he was facing fraud prosecution *visa vis* his employer although he argued that the president's office had no authority to recall him as this was the per-view of the chairman of the commission. That submission confirmed there was a contractual dispute and just like in the *Parker* case (*supra*) the remedy of mandament *van spolie* would be incompetent as a way of enforcing the disputed contractual relationship.

It is apparent from the circumstances of the present case that the applicant and respondent were employee and employer. It is common cause the applicant was in possession of vehicles for use issued from the employer, the respondent. It is also common knowledge that sometime in 2013 the applicant was recalled. Whether the parties agreed or not is not a matter before this court. What is apparent from reading the papers is that there is a contractual dispute. The respondent repossessed the vehicles with the consent of the applicant as evidenced by the indemnity form. It is not sufficient to say surrendering vehicles at the instruction of police means he was forced to relinquish possession given the background of the matter that the vehicles are pool; vehicles and that the applicant had been recalled. To read more to the papers would be speculative. The remedy being sought in the circumstances of this case is incompetent not only because it is arising from a contractual dispute but also because the requirement of *mandamate van spoile* have not been meet. Other than being in peaceful and undisturbed possession of the property the applicant has not on paper proved he was unlawful and wrongfully deprived of such possession. The dispossession appears to have been by negotiation and consent from reading the

papers. The applicant also has other remedies as it was argued on his behalf that there are pending labour and or contractual disputes as regards whether or not he is still the CEO of the respondent. According the requirements of spoliation have not been fully satisfied to warrant grant of the remedy to the applicant. In the result it is ordered that:

The application be and is hereby dismissed with costs.

T. K Hove, applicant's legal practitioners
Civil Division of the Attorney General's Office, respondent's legal practitioners