ESTHER HODZA
versus
STEWARD BANK LIMITED

HIGH COURT ZIMBABWE
MANGOTA J
HARARE, 19 and 25, January, 2017

Urgent Chamber Application

W. Jiti, for the applicant
M. Mbuyisa, the respondent

MANGOTA J: Esther Hodza-("Esther") and Steward Bank Limited ("Steward") are parties to the current application. In February 2016, they entered into an agent-principal contract ("the contract").

As the agent of Steward, Esther was authorised to:

(i) accept deposits on behalf of Steward,

(ii) allow withdrawals from the bank accounts of Steward's customer(s);

(iii) attend to balance inquiry and statements requests – and

(iv) collect cash from Econet shops to fund and facilitate withdrawals by Steward's customers.

Pursuant to the contract, Esther received from Steward four point of sale machines ("the machines"). These were for her business outlets.

The relationship between Esther and Steward remained sweet from February, to December, 2016 when it turned sour. In the mentioned month, Steward inquired about a transaction which Esther did on one of the machines with one Jonathan Nhamburo. Subsequent to the inquiry, Steward debited Esther's account with $215 000, wiped out her floating account which had a credit balance of $59 000 and deducted $15 000 from her savings account. It also deducted all the floating accounts which were on the four machines. These had total sum of $7 551,68.

Concerned at Steward's conduct, Esther demanded an explanation. Steward requested her to return the machines to it to enable it to identify the problem. She handed the machines to Steward and these have not been returned to her from 14 December, 2016 todate.

On 15 December, 2016 Esther was arrested on fraud charges. She was arraigned before the court at Mount Darwin where she was released on $200 bail.

It was on the basis of the above-mentioned background that Esther filed her present application on an urgent basis. She claimed that Steward was tempering with her bank account and that it, in addition, despoiled her of:

(a) the sum of $64 000 - and

(b) the four machines. She moved the court to order Steward to return to her the money and the machines and to interdict it from making any deposits or withdrawals on her bank account.

Steward opposed the application. It raised four preliminary matters after which it dealt with the substance of the application. It stated, *in limine*, that:

'(a) the application was not urgent;

(b) Esther did not disclose a cause of action against it. She did not, it claimed, prove the requirements of an interdict.

(c) relief which Esther sought was incompetent – and

(d) there were/are material disputes of fact which were resolvable only through oral evidence.

It submitted, on the merits, that the money and the machines belonged to it. It alleged that Esther used Nhamburo's ATM card to steal the money from it through fraudulent means. It stated that its conduct which Esther complained of centred on its intention to recover what she stole.

The merits of the matter show in clear and categorical terms that there is a material dispute of facts which cannot be resolved on the papers. Steward said she stole its money through fraudulent means. She said she did not do so at all. She, however, acknowledged the existence of this dispute of fact. She submitted, during the hearing of the application, that the dispute would be resolved on the return day when oral evidence would be heard.

The court would have been persuaded to go along with Esther's proposition if her case was a water-tight one. It would have done so in the interest of dispensing justice to the parties. However, for reasons which follow, the court remains disinclined to pursue the suggested route.

Whether or not Esther's application is urgent does, in a large measure, depend on the circumstances of this case. She stated, in her founding affidavit, that Steward's apparently unbecoming conduct started on 13 December, 2016. The conduct persisted to the following day, according to her.

The letter which Esther addressed to Steward on 12 December, 2016 is relevant. It threatened Steward with legal action if the latter did not comply with her demands as contained in the letter within twenty-four (24) hours of Steward's receipt of the same. Steward received the letter on 13 December, 2016. It remained undisturbed by its contents.

Esther, for some unexplained reason, did not act in terms of the letter from 13 December, 2016 to 13 January, 2017 when she filed the present application. She waited for twenty-(20) working days before she made up her mind to, and did actually, file the application. That, in the court's view, is not the conduct of a person who desires an urgent attention to a matter which adversely affected his interest.

Esther was prepared to wait for twenty days. Nothing, therefore, compels her to act now let alone on an urgent basis. The second letter which she addressed to Steward on 5 January 2017 was, as Steward correctly pointed out, an effort on her part to self-create urgency. Indeed the last paragraph of that letter, Annexure C, confirms the court's conclusive observations on that aspect of the matter. It reads:

> "Should you fail to appreciate the urgency of the matter and fail to meet our demand we will be left with no option but to approach the court on an urgent basis and compel you to act on our behalf" [emphasis added]

Annexure C did not add any value to Annexures B which Esther did not act upon. Her conduct did not, therefore, fall into the type of urgency which is contemplated in the rules of court.

Esther, it was observed, couched the heading of her application in the words Urgent Chamber Application For an Interdict. The application, in ernest, related more to a spoliation order than it fell under the heading of an interdict. An examination of the interim draft order which she moved the court to grant her lays bare the stated observation. It reads:

> "INTERIM RELIEF
>
> 1. Respondent be and is hereby ordered to remove the debit balance on applicant's account and restore to Applicant the amount of $64 000 seized by the respondent without lawful authority.
> 2. Respondent be and is hereby interdicted from making any deposits or withdrawals on Applicant's bank account.

3. Respondent be and is hereby directed to restore to Applicant all seized point of sale machines within forty-eight (48) hours of this order" [emphasis added]

Esther's application is, therefore, two-in-one in its form and substance. She applied for an interdict in regard to her account which she holds at Steward's financial institution. She also applied for a *mandament van spolie* in regard to the seized money and the machines.

In so far as her account is concerned, Esther complains that some unknown person (s) who is/are at Steward's institution were/are tempering with her bank account. She said the person(s) deposited $3 850 into the account and withdrew $2 022-15 from the same. The transactions, she alleged, occurred without her knowledge and/or consent. She insisted that Steward's personnel be interdicted from tempering with her account.

Steward denied any knowledge of the allegation. It challenged Esther to substantiate her claims.

Esther, it is needless to mention, is moving the court to grant to her what is normally referred to as a *mandamus* or mandatory interdict. GUBBAY CJ aptly stated the law which relates to this type of interdict. He remarked in *Tribac (Pvt) Ltd* v *Tobacco Marketing Board*, 1996 (2) ZLR 52 [S] 56 B-D as follows:

> "An application for a *mandamus* or mandatory interdict ….. can only be granted if all the requisites of a prohibitory interdict are established. These are:
> 1. A clear or definitive right – this is a matter of substantive law.
> 2. An injury actually committed or reasonably apprehended – an infringement of the right established and resultant prejudice.
> 3. The absence of a similar protection by any other ordinary remedy. The alternative remedy must –
>   (a) be adequate in the circumstances;
>   (b) be ordinary and reasonable;
>   (c) be a legal remedy – and
>   (d) grant similar protection [see *Setlogelo* v *Setlogelo* 1914 AD 221, 227 and *PTC Pension Fund* v *Standard Chartered Merchant Bank*, 1993 (1) ZLR 55 (H) 63 A-C"]

Esther has a clear right to her bank account which she holds at Steward's institution. Her allegation that the account was tempered with in the recent past cannot be glossed over. She has a reasonable apprehension that, if the tempering with the account remains unchecked, that may continue in an unabated manner to her prejudice. She assets, and correctly so, that she has no other remedy which she may employ to stop the person(s) alleged to be doing so from tempering with her account. It is, therefore, proper that anyone who may be infringing upon her right in the mentioned regard be specifically prohibited from continuing to do so.

It is debatable if Esther is entitled to a spoliation order in regard to the money and the machines. She moved the court to order Steward to return those to her. Her prayer in the mentioned regard falls under what is referred to as the remedy of *mandament van spolie*.

Jerold Taitz discussed the character and nature of the remedy. He did so in the [1982] 99 *South African Law Journal*, 351 wherein he remarked at p -355 as follows:

> "The essence of the remedy is the restoration of the property to the possessor before the court will consider anything else. The *raison d'etre* for the remedy is to prevent persons, including the true owner, from taking the law into their own hands. The fact that the remedy is available even against the true owner in favour of a thief or a robber makes it unique…" [emphasis added].

Mandament van spolie, it is emphasised, does not concern itself with ownership. It concerns itself with possession. It discourages owners of things from taking the law into their own hands or resorting to self-help. It aims at restoring the *status quo ante* the despoiling. [See *Nino Bonino* v *de Lange*, 1905 TS 120, 122F]. In *Chisveto* v *Minister of Local Government and Town Planning*, 1984 (1) ZLR 248 REYNOLDS J made the following remarks about the remedy:

> "… It is a well-recognised principle that in spoliation proceedings it need only be proved that the applicant was in peaceful possession of something and that there was a forcible or wrongful interference with his possession of that thing. … Lawfulness of possession does not enter into it" [emphasis added].

ADAM J cited, with approval, the remarks of REYNOLDS J. He did so in *Davis* v *Davis*, 1990 (2) ZLR, 137 (H) 142 wherein he quoted Leon J's remarks in *Oglodzinski* v *Oglodzinski* 1976 L4) SA 273 D at 274 and said:

> "In a spoliation application the court does not decide what – apart from possession – the rights of the parties to the spoliated property were before the act of spoliation but merely orders that the *status quo* be restored".

The record showed that Esther was never in possession of the money which she claimed Steward despoiled her of. Neither the $64 000 nor any sum, including what she termed her savings of $15 000 was not ever in her possession. All the money which she mentioned in paras 11 and 13 of her affidavit was at all material times in the possession of Steward. Steward in fact stated, and correctly so, that the money was its own property. It, in the mentioned regard, referred the court to the case of *Standard Chartered bank Ltd* v *China Shougang*, 2013 (2) ZLR 385 (S) 388 B wherein ZIYAMBI JA stated that:

> "The general rule relating to deposits made in a bank account by a customer is that the money becomes the property of the bank which can use such deposits as it pleases….." [emphasis added]

Esther cannot, under the above stated circumstances, successfully claim that she was in peaceful and undisturbed possession of the money. She is estopped from asserting, as she attempted to do, that Steward despoiled her of the money whatever amount it was. She could not and cannot be despoiled of what she did not and does not possess. The credit balance which was reflected in her savings account did not, and does not, show that she possessed $15 000 let alone that she owned, or owns, the same. The moment she deposited the stated sum into Steward's institution, she cessed to possess let alone own that money.

Esther and Steward were *ad idem* on the point that the four machines were, or are, the property of the latter. Steward availed them to Esther in pursuance of the contract which the two concluded between them in February, 2016. The contract is still extant.

Esther's evidence was that she voluntarily returned the machines to Steward. She stated that she did so at the request of Steward which advised her that it wanted to identify the problem which related to the machines. She submitted that she returned the machines to Steward on 14 December, 2016.

It is evident, from the foregoing, that Esther was not in possession of the machines from 14 December, 2016 todate. She lost possession when she voluntarily returned the same to Steward. She cannot, under the stated circumstances, successfully sue for a spoliatory order in regard to the machines.

The court finds fortification for the position which it holds of the matter on the point from the remarks of MCNALLY JA who, in *Patel* v *Sigauke and Anor*, 1994 (2) ZLR 123 (S) 128 E said:

> "The *jus possessionis* ……. is nothing more than the right flowing from the fact of possession. It is not a right to possession; but the right of possession. It disappears once possession lost" [emphasis added]. (See also Silberberg & Schoeman : *The Law of Property in South Africa, 3rd ed*. Pp 113 – 114 and Jourbert *The Law of South Africa* vol 27 p 50).

Esther lost possession. She was not forcibly or wrongfully deprived of the machines. She voluntarily handed them over to their owner. She did not state whether or not investigations which caused the machines to find their way to their owner have been completed. Such investigations may well still be in progress. No time limit was stipulated as the period that Steward would retain the machines. The sour relationship which has, of late, characterized the parties' contract points to the probability that Steward would not want to continue with the same. It made allegations along what it termed fundamental breaches of the contract by Esther. It said it has already commenced procedures which

were aimed at the termination of the contract on the basis of fraud and breach. The machines, it has already been stated, were dished out to Esther pursuant to the parties' contract which, in Steward's words, hangs in the balance. The contract which caused the machines to be transferred to Esther would, in any event, expire in February, 2017. It would, therefore, not be in the interdict of justice for the court to order that the machines be returned to Esther under the observed circumstances.

The court has considered the merits and demerits of this application. It, accordingly, orders as follows;

(i) That the application for an interdict in respect of the applicant's account be and is hereby granted.

(ii) That the application for a spoliation order in regard to the money and the point of sale machines be and is hereby dismissed.

(iii) That each party be and is hereby ordered to pay its own costs.

Musendekwa – Mtisi, applicant's legal practitioners
Mtetwa & Nyambirai, respondent's legal practitioners