MHONDORO NGEZI RURAL DISTRICT COUNCIL
versus
AMON NYASHA CHIHURI
and
MESSENGER OF COURT (KADOMA)

HIGH COURT OF ZIMBABWE
TSANGA & CHINAMORA JJ
HARARE, 5 October 2023 & 13 March 2024

Civil Appeal

L Matapura, for the appellant
1st respondent barred
No appearance by 2nd respondent

TSANGA J:

The background facts

This appeal primarily centres on whether the decision by the Magistrates Court in granting a spoliation order which had been applied for in the initial instance without the other side (*ex parte*) was proper. The facts against which the order was granted *ex parte* were these. The first respondent herein, Amon Nyasha Chihuri, approached the court below seeking return of a vehicle described as a Nissan UP truck registration number AFK 9644. Since the second respondent, the Messenger of Court is cited here in his nominal capacity and did not file any papers, for ease the first respondent shall be referred to hereinafter as simply the respondent. Also suffice it to point out from the onset for purposes of understanding the appellant's objections to the order granted that the application had been made against the backdrop of Order 23 Rule 1 of the Magistrates Court Rules 2019 which provides as follows:

> INTERDICTS AND ATTACHMENTS
>
> ***1. Method of application***
>
> (1) An application to the court for an order referred to in section 12 of the Act (an order for arrest *tam quam suspectus defuga*, an attachment, an interdict or a *mandamenten van spolie*) or for an order referred to in Order 22 rule 7(1)(a) and (b) **may be made ex parte**.

Buoyed by the above provision which permits spoliation to be sought *ex parte,* the respondent had made an application in the court below in which he averred that Mhondoro Ngezi Rural District Council (the appellant herein), had forcibly and unlawfully infringed his right and possession of the said motor vehicle. He had hired it out to one Stanley Siwela, his client, for him to transport firewood. This was upon him being satisfied that Siwela had a valid Forest Produce Movement or Export Permit as well as a valid Firewood Traders Licence. He had given him the vehicle through his driver. He had later learnt from his driver that they had been arrested by the appellant's security officers for transporting firewood without a permit. The firewood was said to have been harvested from a senior government official's farm. The respondent's vehicle, together with the firewood, were impounded despite there being the said permits. Against this backdrop, he had approached the court with an *ex parte* application for spoliation to be restored possession of the vehicle. The *ex parte* application was granted and on the return date it was further confirmed.

On the return date, the appellant who had since been served with the provisional order raised issues pertaining to the granting of the spoliation order on an *ex parte* basis in the first place. Appellant had submitted that the provisions of order 23 rule 1, by allowing an application for spoliation to be made ex parte, create a procedure which is against a settled principle of law and against the principle of *stare decis* given that in granting a *mandamus van spoile,* the court must be satisfied that all elements of a final interdict are established and as such there will not be any other final determination of the matter on the return day.

Given that in nature a spoliation order is final when a court is indeed satisfied that a party has been unlawfully deprived of his property without due process being followed, appellant's argument was straight forward. It was that despite the provisions of Order 23 rule 1 of the Magistrates Court rules of 2021, a spoliation order cannot and should not, given Zimbabwe's laws on spoliation, be sought by way of an *ex parte* application. Since a finding that there has been spoliation is final in nature, proceeding *ex parte* without hearing the other side was said to amount to granting a final relief at that point because there will be nothing to confirm on the return date.

It was the effect of spoliation resulting in a final order upon which it was argued that approaching the court *ex parte* in a spoliation matter is fundamentally not procedural in nature. Put succinctly, the objection amounted to saying once a spoliation order is granted, there is no need for further pretences hiding behind a finger of a return date.

Regarding the granting of the order itself, the application was said to be invalid as it was premised on an illegality as neither the applicant nor Stanley Siwela were said to have a valid permit authorising them to harvest and move wood from Number 2 Battlefields or ARDA for sale in Kadoma. In essence, the argument was that the provisional order ought not to have been granted since the applicant and his colleague had stolen firewood. The respondent had maintained that the permits were valid and disputed that the police had received a formal complaint as no statement was recorded from them. No evidence of such complaint was on record. He had also disputed paying a fine either to the police or to the appellant, Mhondoro Rural District Council.

The lower court's finding

Against this factual conspectus, the court below examined the requirements of spoliation being peaceful and undisturbed possession as well as unlawful deprivation which is proven on a balance of probabilities. *Banga* v *Zawe* SC 54 /14 and *Kama Construction* v *Cold Comfort Cooperative* 1999 (2) ZLR 19 SC. The court focused on restoration from unlawful possession and the fact that with spoliation, the rights of the parties do not come into it. It stressed that even an unlawful possession can be protected. In granting of the order *ex parte* the magistrate underscored that the Magistrates Court is a creature of statute, and, that the relevant provision in the Rules has not been repealed, which permits a spoliation application to be made *ex parte*. Moreover, the lower court further observed that if the complaint was about procedure, then a review should have been sought. Regarding perceived constitutional violation of the appellant's rights, no application on the constitutional point had been made challenging the validity of the order impugned.

On granting the spoliation on the merits without being satisfied that all elements of a final interdict were established, the court's observation was that the requirement of an interdict and *mandamus van spoile* are different and have distinct requirements and procedures. The court stressed that the issue of illegality was neither here nor there as was the fact that the firewood was stolen did not enter into consideration. The primary issue was whether the applicants had been dispossessed unlawfully. In that regard the court reached the conclusion that the unlawful dispossession itself had not been challenged. No police report had been attached and there was no evidence that a report had indeed been made to the police. There was also no supporting affidavit that the respondent and the driver had refused to pay the fine at the Rural District Council. The court was therefore satisfied on the merits that the applicant in the court below had indeed been unlawfully deprived of property.

Grounds of appeal

The appeal thus challenges both form n and content of the order granted stating that the court a quo erred in the following ways:

1. Failing to find that a spoliation order being final and definite cannot be granted as a provisional relief pending confirmation on the return date.
2. Granting a spoliation order on evidence of a *prima facie* right as an interim relief pending its confirmation on the return date.
3. Failing to find that in an application for a spoliation order there ought to be no return date for the confirmation of a rule nisi or interim relief, hence the granting of the rule nisi was irregular.
4. Finding that an order for spoliation can be granted *ex parte* as interim relief allowing restoration of possession pending confirmation of the return date.
5. Finding that order 23 Rule 1 of Magistrate Court Civil Rules by allowing an application for spoliation order to be made *ex parte* created a justifiable limitation of the Applicants rights.
6. Making a finding that Respondent was in possession of a valid Firewood Trading License and a Forest Produce Movement Permit respectively, which finding was not supported by the record.
7. Failing to take into account the material fact that the Respondent had failed to establish all facts and legal requirements entitling the granting of the application for spoliation by the Court.

The relief sought is that the appeal be dismissed with costs and that the order of the lower court be substituted with a dismissal of the *ex parte* application under case no.CGK353/22. It is also sought that the respondent returns the motor vehicle to Mhondoro - Ngezi Rural District Council. Costs are pursued on an attorney client scale.

The appeal grounds are largely repetitive. At the hearing of this appeal Mr. Matapura highlighted that in essence only two issues fall for decision, namely;

a) Whether or not the decision by the court a quo to the effect that a *mandamus van spolie* can be granted *ex parte* was proper in light of Supreme Court decisions on the nature of a *mandamus van spoile*.
b) The second issue for decision relates to the substantive decision in granting the order itself the essence of the ground of appeal here being that it was wrong to order release of the vehicle as it interferes with the powers of a local authority

Legal and Factual Analysis

a) Whether it was proper to grant the spoliation order ex parte

The core of the argument is that the Supreme Court in *Blue Rangers Estates (Pvt) Ltd* v *Muduviri* & Another 2009 (1) ZLR 368 (SC), where spoliation had been granted under a provisional order, the judge of appeal decided that spoliation is a final order for purposes of appeal as there is there is nothing for a party to seek on the return date. Appellant's counsel herein has interpreted that case as meaning that a spoliation can never be made in the form of a provisional order.

In *Blue Rangers supra*, the spoliation order was issued in the form of a provisional order and had been appealed against to the Supreme Court. The respondent in the case had sought to argue that there was no appeal before the court because the spoliation order had been issued in the form of a provisional order and the order was argued to be thus interlocutory in nature, needing the leave of the judge before it could be appealed. Whilst MALABA DCJ (as he then was), indeed concluded that the spoliation order was final in nature due to the essential requirements of spoliation, more significantly, when it came to form, he emphasized the following at p 377-F -G of the judgment:

> "The fact that the order was in the form of an interim relief is irrelevant to the consideration of the question whether it is final or interlocutory. The issue of an order in the form in which it was applied for does not make the order itself a provisional order. 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."

As he also put it at p 376 G-H

> "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 to which relief is sought from the Court."

He also observed that "(m) any orders which are final in form are in fact interlocutory whilst some which are interlocutory in form are in fact final and definitive orders". The take away from all this is that focus ought to be on the content rather than its form in the determination of whether an order is final. In other words, with this approach a final order could in fact emerge from a provisional order.

Also noteworthy, the Judge in *Blue Rangers* was not dealing specifically with the position in the Magistrates court. This makes that case distinguishable. Conspicuously, the case having been decided in 2009, there was an opportunity to do away with permitting spoliation to be made by way of an *ex parte* application when the Magistrates Court Rules were amended

and replaced with the Magistrates' Court Rules in 2019, yet this was not done. The allowance was retained.

Furthermore, there is nothing unusual in permitting a spoliation to be by way of an *ex parte* application. Writing in relation to spoliation with specific reference to the practice and procedure in magistrates' courts in South Africa, TORQUIL J. Paterson [1] explains as follows.

> "It should be noted that where a spoliation order is sought by means of an ex parte notice of motion the court according to the general principles issues a rule nisi, however, where the spoliator has received notice of application and has placed his case before the court a rule nisi is unnecessary."

Given the similarity on our legal systems and the fact that our rules more often than not are heavily influenced by those of our neighbour, these observation further lend credence to the fact that there is nothing abnormal in spoliation order being made in the form of an *ex parte* application with a *rule nisi* being issued.

It is also not uncommon to find other areas of difference regarding approach to certain principles between lower courts and upper courts as a result of distinct magistrates court rules. A few examples will suffice. For instance, up until the introduction of the Magistrate's Court Rules of 2019, wilful default, unlike in the superior courts, was determined separately from prospects of success. If there was wilful default that was simply the end of the enquiry in an application for rescission. In other words, an applicant had to pass the wilful default stage. [2]

The use of the words "unless it is proved that the applicant was in wilful default" meant that once the court found that the applicant was in wilful default it could not grant the orders in terms of rules (1) (a) and (b) but was obliged to dismiss the application. The Supreme Court itself accepted the difference as exemplified by *Fletcher* v *Three Edmunds (Pvt) Ltd*; *Vishram* v *Four Edmunds (Pvt) Ltd* 1998 (1) ZLR 257 (SC) at p 260 B where GUBBAY CJ remarked as follows;

> "Order 30 Rule 2(1) of the Magistrates Court (Civil) Rules expressly provides that a magistrate has no power to rescind where the default was wilful. The enquiry terminates with that finding. Indulgence must be withheld. See *Neuman (Pvt) Ltd* v *Marks* 1960 R&N 166 (SR) at 168B-C; *Gundani* v *Kanyemba* 1988 (1) ZLR 226 (S) at 228F; *Karimazando* v *Standard Chartered Bank Zimbabwe* 1995 (2) ZLR 404 (S) at 407E-F."

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[1] Torquil J. Paterson in Erkard"s Principles of Civil Procedure in the Magistrates' Courts, 5th edition, Juta and Company Ltd, at p76

[2] Order 30 r 2 of the Magistrate's Court Rules 1980 then provided as follows: "2 (1) The court may on the hearing of any application in terms of rule 1, unless it is proved that the applicant was in wilful default—
(*a*) rescind or vary the judgment in question; and
(*b*) give such directions and extensions of time as necessary for the further conduct of the action or application.

Another area of differences in approach between the magistrates' courts and superior courts relates to suspension of a judgment pending appeal. Whilst an appeal from the High Court suspends the decision appealed against, that is not the case with a magistrates court decision.

Whereas superior courts have an inherent jurisdiction to regulate their own procedures and process from a common law position, and the rule of practice which has evolved is that the operation of the judgment of a superior court is suspended upon the noting of an appeal against that judgment, by contrast in the Magistrates Court Act by virtue of s 40 of that statute, the situation is different. It provides as follows:

> **"40Appeals**
> (3)Where an appeal has been noted the court may direct either that the judgment shall be carried into execution or that execution thereof shall be suspended pending the decision upon the appeal or application."

In *Ritenote Printers (Private) Limited* v *Adam And Company* & Anor SC 15/11 CHIDYAUSIKU CJ as he then was stated as follows:

> "In my view, the wording of s 40(3) of the Act leaves a lot to be desired, but a proper reading of the section reveals that it confers on the magistrate the power to stay execution despite the noting of an appeal. The section also confers on the magistrate the power to order execution despite the noting of an appeal. It follows therefore that for the magistrate to exercise the discretion in terms of s 40(3) of the Act, the party seeking to have the discretion exercised in its favour has to make an application. Upon the making of such an application the magistrate exercises the judicial discretion and makes a proper determination."

The fact that the application for spoliation was made as an *ex parte* application is thus not at all fatal, considering that the magistrate's court as a creature of statute, is bound by its own legislation or rules however different that position may be from the practice and procedure of Superior Courts.

Additionally, a magistrate confronted with such a matter *ex parte* is clearly at liberty to make an informed decision whether the matter should proceed *ex parte* or be dealt with as an urgent application with notification to the other party. After all the provision says "may". With Magistrates Courts serving a wide array of litigants as compared to superior courts in the context of the formal legal system, one cannot rule out factual instances where a party may indeed be factually justified in approaching the court *ex parte* on a spoliation order as permitted by the Magistrates Court rules. These instances where certain common law positions are varied or where procedures are distinguishable between lower courts and upper courts, must be approached from the perspective of understanding the purpose such relaxations or departures

seek to serve. It would indeed be reckless for this court to rush to condemn in favour of uniformity without any research based knowledge of the various circumstances involving *ex parte* spoliation applications in the lower courts and whether or not the provision should be retained or changed.

Turning to the granting of the order on substance, TORQUIL J. Paterson also remarks as follows regarding the substance of spoliation in discussing its application in the magistrates courts:

> "It is not necessary for an applicant to make a prima facie case, the party does not have to prove that he had a right to be in possession and the respondent cannot assume that the applicant was in unlawful possession or that he had a superior right to the item than the applicant. The onus of proving that the deprivation was lawful rests upon the respondent."[3]

And further:

> "…..The rule that applies is that no one may take the law into his own hands and disturb the possessor in his right of possession. If the owner of property is unlawfully deprived of possession he must approach the court for relief. The dispossessed may not himself go in search of his property and take it back from the possessor."[4]

Indeed in this instance, the appellant, in the affidavit on record sworn to by Mavis Ngorima Mhlanga, pretty much acknowledged that once it received the provisional order it then embarked on investigating fully the legitimacy of the permits. How then could it have confiscated the vehicle if these further investigations still needed to be done? The lower court was also spot on that the evidence of a police report was absent. Whilst the appellant's affidavit averred to the swipe machine having been broken, the court below was correct that there was no supporting affidavit. Suffice it to note that there was also a careful avoidance to mention how much the respondents had been asked to swipe at the police station. There was no error on the part of the magistrate's court in confirming the spoliation order on the merits.

Disposition

All in all the appeal lacks merit and is dismissed with costs.

CHINAMORA J:……Agrees

Mafongoya & Matapura Law Practice, appellant's legal practitioners

[3] Torquil above at p 74
[4] Above, at p 74