DEBORAH SUSAN BENNETT
versus
RODNEY ALLEN BENNETT
and
THE COMMISSIONER GENERAL OF
THE ZIMBABWE REPUBLIC POLICE
and
THE OFFICER IN CHARGE
BORROWDALE POLICE STATION
and
THE MESSENGER OF COURT
(HARARE CIVIL MAGISTRATES COURT)
and
THE CLERK OF COURT
(HARARE CIVIL MAGISTRATES COURT)

HIGH COURT OF ZIMBABWE
MAXWELL J
HARARE, 22 November 2021 & 12 January 2022

URGENT CHAMBER APPLICATION

Advocate E Mubaiwa, for applicant
Advocate G.R.J.Sithole, for 1st respondent
Mr R.T. Nyatoti, for 2nd and 3rd respondents
No appearance for 4th and 5th respondents

MAXWELL J: On 24 November 2021, a spoliation order in favour of the applicant was issued. On 26 November 2021, a request for reasons for the judgment was made for the purpose of an appeal under SC456/21. These are they:

On 17 November 2021 applicant approached this court on an urgent basis seeking among other things, a spoliation order against the first respondent. She wanted immediate restoration of her exclusive occupation of 12 Beach Road, Borrowdale, Harare. Applicant stated that she is married to first respondent but they are in the midst of a divorce, case number HC 5353/21. The

first respondent is alleged to have left the matrimonial home around December 2020 and that his personal belongings and items were surrendered to him. According to applicant, the house in question is not part of the matrimonial estate as she got it as part of a divorce settlement in a previous relationship. Applicant stated that first respondent's first attempt to return to the matrimonial house was in September 2021 when he approached the Domestic Violence Court. He sought for a protection order on the basis that applicant had been abusive to him and denied him access to the house, among other things. The magistrate wondered why the then applicant (first respondent herein) would want to be despoiled back into the home where he was being abused. The application was dismissed.

On 16 November 2021, applicant was served with a spoliation order granted *ex parte* by the magistrates' court. The order directed that Applicant should give first respondent access to the house within 24 hours. It also directed the police to arrest her if she fails to comply with the order. Applicant noted an appeal against the *ex parte* order on the same day but served the first and third respondents the following day. Applicant alleged that there were threats to arrest her even after she noted an appeal. She further alleged that on 17 November 2021 first respondent broke into her premises and forcibly took occupation of the house. According to her, he was not assisted by either the police as directed in the spoliation order or the messenger of court, but came with a locksmith who assisted him. Applicant said first respondent threatened to shoot her if she resisted and also threatened Nicole Anne Le Grange and Liam Fallon, tenants at the cottage on the premises. Applicant and the tenants fled to safety

Applicant stated that her appeal had the effect of negating execution of the order except where leave to execute pending appeal is obtained. She pointed out that her appeal has merit on four grounds. The first is that the issue of access to the house is *res judicata* by virtue of dismissal of the application for a protection order in the Domestic Violence court. The second is that the spoliation order is grossly irregular as it was issued in proceedings that effectively reviewed an earlier determination. Thirdly, since a spoliation order is final in nature, it was improper for it to be granted *ex parte.* Finally, a finding that first respondent had been in peaceful and undisturbed possession of the house entitling him to spoliation could not properly be made in the light of his

own testimony that he had not lived at the house since December 2020. Applicant also prayed for the urgent set down of the appeal she had noted.

The tenants deposed to supporting affidavits confirming that first respondent had not been at the premises since December 2020 and that police officers had been coming to the premises demanding to see applicant. They also confirmed that first respondent had come to the premises in the afternoon of 17 November 2021 with a locksmith and forced his way in. They also confirmed the threat of shooting and that they fled from the premises.

Mr Nyatoti indicated that second and third respondents would abide by the decision of the court. The application was opposed by the first respondent. He raised the following points *in limine:*

1. The certificate of urgency is invalid,
2. The matter is not urgent,
3. There was no spoliation,
4. The relief sought is incompetent, and
5. The application is based on falsehoods and misleading information.

On the merits, first respondent confirmed the marriage and the pending divorce. He however disputed that his personal belongings were surrendered to him and alleges acts of spoliation against him. He also disputed that the house in question is not part of the matrimonial estate. He averred that the spoliation order was competently granted and remains extant and that by the time the applicant noted her appeal the fourth respondent had already executed or enforced the interim order granted by the magistrates court. He denied breaking into the premises, forcibly taking occupation of the house and threatening to shoot applicant. He insisted that fourth respondent restored his right of occupation and access to the premises in execution of the magistrates' court order prior to applicant having entered her appeal. First respondent alleged that applicant and her tenant voluntarily left the matrimonial home without surrendering the keys to the house. He urged the court not to deal with the merits of the applicant's appeal as it was not the proper forum for that. First respondent stated that whatever challenges the applicant was having with the police were matters whose administrative control he did not possess. According to first respondent, there is no valid cause of action for a spoliation order whether on a *prima facie* case or balance of

probabilities, therefore the matter cannot by any stretch of the imagination be urgent. He pointed out that whether or not applicant should be given exclusive occupation of the matrimonial home is *lis pendens* in the divorce proceedings, in the appeal against the spoliation order and on the return date in the magistrates' court. Further that it is *res judicata* until the appeal court sets aside the *ex parte* order granted by the magistrate. First respondent urged the court not to grant the relief sought.

POINTS IN LIMINE

Advocate Sithole persisted with the points *in limine.* On the first point he argued that the deponent to the certificate of urgency had not applied her mind to the facts of the matter. He referred to the case of *Chidawu & Ors* v *Shah & Ors* SC 12/13 in which it was stated that**; -**

> **"**In certifying the matter as urgent, the legal practitioner is required to apply his or her own mind to the circumstances of the case and reach an independent judgment as to the urgency of the matter. He or she is not supposed to take verbatim what his or her client says regarding perceived urgency and put it in the certificate of urgency."

He argued that as enforcement had been done by the messenger of court and that the return of service is proof of that, the deponent ought to have concluded that there was no spoliation and therefore no urgency. He also argued that first respondent's restoration of occupation and access to the matrimonial home had been done by a lawful process carried out by the fourth respondent as stated in para 1.7 of the founding affidavit. *Advocate Mubaiwa* stated in response that the correct authority had been cited but a wrong point made. He argued that in the certificate of urgency *in casu*, the legal practitioner had considered the timeliness of the action taken, what would happen if the court does not intervene as well as the applicable law. He pointed out that the messenger of court's return of service arose from the first respondent's papers and therefore could not have been considered at the time the certificate of urgency was prepared. He also pointed out that the certificate of urgency is not there to argue the merits of the matter.

I found favour with the submissions made on behalf of the applicant. The *ex parte* application was not one of the documents considered by the deponent to the certificate of urgency. The messenger of court's return of service was in the *ex parte* application. The certifying legal practitioner cannot be faulted for not considering documents that were not before her. In addition, para 1.7 of the founding affidavit does not refer to restoration of occupation as alleged but to

service of the order which gave applicant 24 hours to comply. On that basis I found no merit in the first point *in limine.*

On the second point *in limine, Advocate Sithole* submitted that the matter was not urgent as restoration of occupation was lawfully done by the messenger of court. He further submitted that the order was executed before the entry of the notice of appeal. He submitted that there is a dispute of fact as to the time of execution of the order vis-à-vis noting of the appeal and that the dispute can only be resolved by calling the Deputy Messenger of Court. On the third point *in limine, Advocate Sithole* argued that in the face of the existence of the return of service from the messenger of court there was no spoliation. On the fourth point *in limine,* it was submitted for the first respondent that the relief sought is incompetent as the matter is *res judicata. Advocate Sithole* submitted that the magistrates court had already determined the issue of exclusive restoration sought by the applicant and that the present application is a disguised appeal. On the last point *in limine, Advocate Sithole* pointed out that it is a lie that applicant was despoiled as restoration was effected by the messenger of court. He referred to the case of *Leader Tread Zimbabwe* v *T.M.Smith* HH 131/03 in which it is stated that if a litigant lies or tells a lie on a material aspect of evidence, she is taken to have lied in everything. On the basis of that case, *Advocate Sithole* submitted that once there is a lie about what happened on 17 November 2012 the court should disregard everything Applicant submitted and dismiss the application. He further submitted that applicant stated that she was in peaceful and undisturbed occupation yet in separate proceedings there is an indication that a tenant leases the whole premises. He submitted also that the inconsistency in evidence entitles the court to conclude that she is lying and that as the credibility of the applicant is in question the application should be struck off with costs on a punitive scale.

Advocate Mubaiwa referred to the case of *Mushore* v *Mbanga & Ors* HH 381/16 in response to the issue of the alleged lack of urgency. He pointed out that what constitutes urgency as established in the *Mushore* v *Mbanga & Ors* case (supra) is how swiftly one acts and what consequences would befall the litigant who does not approach the court swiftly. He argued that the submissions on behalf of the first respondent are on the merits of the matter. He pointed out that the issue of timely action was not addressed. He also pointed out that the question of harm is considered whether at the time applicant acted she had a basis for fearing harm. Also, that

applicant had established spoliation and that she had been rendered homeless. *Advocate Mubaiwa* disputed that there are material disputes of facts that cannot be resolved on the papers.

In the case of *Kuvarega* v *Registrar –General & Anor* 1998 (1) ZLR 188 (H) what constitutes urgency is defined in the following terms:

> "What constitutes urgency is not only the imminent arrival of the day of reckoning; a matter is urgent, if at the time the need to act arises, the matter cannot wait."

MAKARAU J (as she then was) in *Document Support Centre (Pvt) Ltd* v *T.F Mapuvire* HH 117-2006 expressed the view that urgent applications are those where if the courts fail to act, the applicants may well be within their rights to dismissively suggest to the court that it should not bother to act subsequently as the position would have become irreversible and irreversibly so to the prejudice of the applicant. I was satisfied that applicant's case met the requirements for urgency and therefore found no merit in the second point *in limine.*

Advocate Mubaiwa submitted that the final three points *in limine* go to the merits of the matter. He submitted that when the appeal was noted, the right to execute was lost in accordance with s 40 (3) of the magistrates court Act [*Chapter 7:10*], even if aided by the messenger of court. He pointed out that first respondent did not state the time execution was effected and did not dispute that he went to the premises in the afternoon as stated in para 2.4 of the founding affidavit. Since the returns of service show that first respondent and the messenger of court were served with the notices of appeal in the morning of the same day, *Advocate Mubaiwa* argued that there is no dispute of fact as by the time first respondent took occupation of the premises he was barred in terms of s 40 (3) of the magistrates court Act. He concluded that applicant had successfully proven that she had been unlawfully despoiled.

Advocate Mubaiwa disputed that the relief sought is incompetent and averred that the defence of *res judicata* applied. He pointed out that the issue before the court does not affect the order by the magistrate but is about reversing resort to self-help. He further pointed out that in any event the order of the magistrate was invalid in that it has a return date and yet it is final in effect and the order sought is identical to what was granted in the interim. On the issue of falsehoods *Advocate Mubaiwa* indicated that the affidavit relied on for that averment was not filed and is

therefore not part of a court record. He referred to the case of *Bozimo Trade & Development Company (Pvt) Ltd* v *First Merchant Bank of Zimbabwe & Others* 2000 (1) ZLR 1 (H) for the submission that a litigant who misleads the court in some respect is not non-suited by reason of falsehood but is penalized by an order of costs.

I agreed with *Advocate Mubaiwa* that the points in limine are related to the merits of the matter. The issue of the return of service in the *ex parte* application is central. The answer to questions whether or not there is urgency and whether or not there was spoliation comes from examining the return of service and establishing what happened first, execution of the *ex parte* order or service of the notice of appeal. I found no merit in the points *in limine* and dismissed them all.

SUBMISSIONS BY THE PARTIES

Advocate Mubaiwa stated that the requirements for spoliation set out in *Chisveto* v *Minister of Local Government & Town Planning* 1984 (1) ZLR 248 are satisfied in the founding affidavit. The requirements are that applicant should allege and establish that she was in peaceful and undisturbed possession of the premises. She must also allege and establish that respondent took that possession from her unlawfully or otherwise without her consent. He pointed out that the ruling in the Domestic Violence Court indicates that first respondent had prayed that he be allowed access or to return to the house and that that prayer would not have been made if he had been in occupation. Further that the fact that the application seeking access had been made confirmed that possession was with applicant. He stated that the occupation was undisturbed that is why first respondent had to approach the court for permission to return. In any event first respondent had admitted that he had been away from the premises since December 2020 and that fact is in the magistrate's ruling on page 17 of the record. It was submitted for applicant that on the authority of *Mining Industry Pension Fund* v *Dab Marketing (Pvt) Ltd* SC 25/12 the admission by the first respondent transformed into a factual finding. The first requirement for spoliation was therefore established. On the second requirement, *Advocate Mubaiwa* submitted that the issue turns around the return of service and s 40 (3) of the magistrates court Act [*Chapter 7:10*]. He pointed out that applicant stated in her founding affidavit that first respondent came to despoil her in the afternoon and yet the issue of time is not engaged in the opposing affidavit. Further that even the return of

service by the fourth respondent does not indicate what time execution was done. He submitted that in light of the fact that the notice of appeal had been served on the fourth respondent at 0913hours and on first respondent's legal practitioners at 1100hours, it follows that the execution carried out in the afternoon was not in terms of the law and it amounted to spoliation.

Advocate Mubaiwa also submitted that applicant prayed for her appeal to be heard on an urgent basis. He placed reliance on the case of *Zimbabwe Development Party* v *Minister of Justice and Others* CCZ 11/17 for the position that in appropriate cases an order can be given for the urgent hearing of an appeal.

In response, *Advocate Sithole* stated that it is competent to seek the urgent set down of an appeal or review. He however had reservations on the practicality of the order sought in relation to enforcement considering administrative processes that are necessary before an appeal is heard. He pointed out, among other things, that the order sought is silent on the issue of the invitation to the parties to inspect the record and there is no provision for the filing of heads of argument. On the issue of spoliation, *Advocate Sithole* submitted that there is an extant order granted by the magistrates court and enforcement of an order through the messenger of court does not amount to unlawful conduct or spoliatory conduct. He pointed out that there are two extant orders which recognize and afford both parties rights to access and occupation of the premises. He further pointed out that in the face of the regular return of service by the messenger of court, there cannot be any act of spoliation. According to him, first respondent had occupation restored to him before the appeal was noted. He urged the court to utilize Rule 60 (8) and call the messenger of court for *viva voce* evidence on the time execution was effected. He persisted that there was no spoliation and that applicant voluntarily left the premises.

THE DECISION MADE AND REASONS THEREOF

1. The spoliation order was granted with amendments to the draft order.
2. Paragraphs 1-4, 9 and 10 of the draft order were granted with amendments.
3. Paragraphs 5-8 of the draft order are not granted

It is common cause that first respondent was, as from December 2020, not residing at the matrimonial premises. On 23 September 2021 he applied for a protection order in terms of the

Domestic Violence Act [*Chapter 5:16*] alleging abuse, displacement and neglect. The application was dismissed. The ruling dismissing the application is stamped 7 November 2021. On 15 November 2021, first respondent obtained a spoliation order *ex parte* with 2 December 2021 as the return date. The order was for restoration of access and occupation within 24 hours of service upon Applicant. On 16 November 2021 applicant appealed against the *ex parte* spoliation order. The notice of appeal was served on 17 November 2021 the messenger of court at 0913 hours and on first respondent's Legal Practitioners at 1100 hours.

Applicant alleged that respondent resorted to self-help and broke into the premises in the afternoon of 17 November 2021. She alleged that he was not assisted either by the police or the messenger of court. She further alleged that this was illegal as she had noted an appeal and the spoliation order could not be executed without the leave of the court pending the appeal. First respondent alleged that the court order was executed by the messenger of court and the applicant and her tenant voluntarily left the house. The return of service by the messenger of court is attached to the opposing affidavit. First respondent argued that a lawful process was followed.

The court noted that applicant's founding affidavit and the supporting affidavit of Nicole Anne Le Grange specifically stated that first respondent came in the afternoon of 17 November 2021. First respondent did not proffer the time he alleges he was assisted by the messenger of court. The return of service from the messenger of court does not indicate the time execution was done. The locksmith who allegedly accompanied the first respondent and the messenger of court did not depose to an affidavit confirming the time he accompanied them to the premises. It is trite that what is not disputed is taken as admitted. With the issue of the time first respondent went to the premises on 17 November 2021 not having been put in issue on the papers, there was no dispute of fact to talk about. I am not persuaded that the circumstances of this case warrant the resort to Rule 60 (8) of the High Court Rules 2021. The rule is not meant to supplement shortcomings in a litigant's pleadings. Clearly in this case it was within first respondent's means to supply the crucial information on the time the spoliation order was executed at the time of filing his notice of opposition. On a balance of probabilities, first respondent and whoever accompanied, he went to the premises in the afternoon, meaning that he had already been served with the notice of appeal. It follows that he ought to have sought leave to execute pending appeal. His occupation of the

premises was therefore in violation of the law. First respondent stated that applicant was there and voluntarily left the premises with her tenant. He therefore confirmed that applicant was in occupation of the premises when he went there pursuant to the spoliation order.

I find that applicant has satisfied the requirements for a spoliation order in her favour. I am not inclined to grant the request for an order for the urgent set down of the appeal. I find the case of *Zimbabwe Development Party* v *Minister of Justice & Others* (supra) distinguishable.

The applicant was a political party registered in terms of the laws of Zimbabwe which sought to participate in the 2013 harmonised elections. The Constitutional Court had, in *Mawarire* v *Mugabe N.O. and Others* CCZ 1/13, held that elections must be held before 31 July 2013.

The judgment was delivered on 31 May 2013. On 6 June 2013 the applicant filed a constitutional application in the Constitutional Court under case no. CCZ 25/13. In that application, the applicant claimed that it was not receiving funding in terms of s 67(4) of the Constitution of Zimbabwe ("the Constitution") and that it required the same, as provided for in terms of s 155(2)(c) of the Constitution. After filing that application, the applicant filed an urgent chamber application for the urgent set down of the cause in CCZ 25/13. The applicant's case was that should the case not be heard before the President declared elections, the other political parties would have an unfair advantage in the polls. The case was about whether or not the cause under CCZ 25/13 would be defeated if it was not heard on an urgent basis. The reasons for the grant of the order sought was that pursuant to that judgment, the President was due to announce election dates any time. Once the polls were done, the applicant would have no other remedy. The late CHIEF JUSTICE CHIDYAUSIKU was of the view that the set down of the cause under CCZ 25/13 ought to be treated as a matter of urgency because should the cause under CCZ 25/13 not be heard as a matter of urgency, the applicant would have no other remedy available to it, as the dates of the elections may be announced and other parties would get into full campaign swing, which, not surprisingly, needs funding of some sort in one way or the other. Worse still, the elections would be held and the applicant would not have been allowed the best possible chance to fight for the various political offices it wanted to run for. *In casu*, applicant has not established any impending event that would warrant a conclusion that she would have no other remedy. Rule 95 (20) provides for a process for the urgent set down of an appeal. The process is activated

by the Judge President or a Senior Judge. Sufficient administrative processes are available for applicant to follow to ensure the urgent hearing of her appeal.

The prayer for costs on an attorney-client scale was not motivated. Costs on an ordinary scale were therefore granted.

Matizanadzo & Warhurst, applicant's legal practitioners
Magaya & Mandizvidza, 1st respondent's legal practitioners
Civil Division of the Attorney-General's Office, 2nd & 3rd respondents' legal practitioners