KAMOGELO IMPORT AND EXPORT (PVT) LTD 1ST APPLICANT

AND

MICHAEL SIBANDA 2ND APPLICANT

VS

KEITH MPOFU 1ST RESPONDENT

AND

EMERALD MAYIBONGWE MABAYA 2ND RESPONDENT

AND

SHERIFF OF THE HIGH COURT N.O 3RD RESPONDENT

IN THE HIGH COURT OF ZIMBABWE
DUBE J
BULAWAYO 24 OCTOBER 2024

Urgent Chamber Application

Mr N. Sithole for Applicants
Mr T. Solani with Ms C.T. Mathaba for Respondents.

Introduction.

DUBE J: This is a chamber application for a *mandamant van spolie* brought on an urgent basis. The brief facts of the matter are that 1st Applicant is a body corporate duly registered in terms of the laws of the Republic of South Africa but conducting the business of import and exports as well as hauling cargo by road from Zimbabwe to South Africa on contract for clients. 2nd Applicant is employed by the first as a truck driver. It is alleged that on the 18th of August 2024 the 2nd applicant while conducting business of his principal was in Bulawayo from Hwange *en route* to South Africa. He was driving; and in charge of a Scania Truck horse bearing registration number FXL 163 L towing two trailers bearing registration numbers LG52 DS GP AND LG 52 GH GP laden with 32.5 tonnes of coal. It is further alleged that while driving along Khami road, the 2nd Applicant was suddenly accosted by two speeding vehicles with dark tinted windows one a Range Rover and the other a Toyota of an unspecified make. It is further averred that someone from the vehicle with South African registration plates, a truck,

presumably the Toyota, opened his windows and dangled hand cuffs. 2nd Applicant avers that he feared for his life and wellbeing. It was under those circumstances that he drove to the Southampton Building in the city centre where various police departments are housed. The occupants of the two vehicles who were still pursuing him disembarked and confronted him. They are identified as 1st and 2nd Respondents herein. They informed him that his employer owed them a sum of R5 000 000.00 and for that reason they intended to seize the truck he was driving. It became common cause during the hearing that the parties sought audience with the police who commented that the matter was purely civil. When all was said and done 2nd Applicant was made to park the truck horse, two trailers and cargo at a certain truck stop in Bulawayo. The 1st and 2nd Respondents took hold of the truck keys pending payment of the said amount due.

When this matter was placed before me on the 22nd of August 2024, I directed that the Respondents be served with the application and proof filed. That was done by the 23rd August. The return of service was endorsed to the effect that service was effected at 1st and 2nd Respondents' business premises where an employee refused to accept such service. The matter was set down for hearing on the 28th *instant*.

At the hearing the Counsels for the Respondents brought up an application for consolidation and postponement. They motivated their application on two legs, *viz* on the one hand, that they were only served with the application the day before and on the other that they had also filed an application for attachment of the same truck to found jurisdiction. They averred that the said matter was made *ex parte* and was pending before another judge. They further averred that they had received directions to serve the current Applicants by the judge seized with the matter. They argued that since the matters involved the same parties, the same legal practitioners based on relatively the same facts, it would be expedient to consolidate, deal and dispose of both matters in one go.

The application was vigorously opposed by *Mr Sithole*, counsel for the Applicants. He argued that the matter was appearing for arguments and not case management. He argued further that an application for consolidation should be made to the registrar who shall place it before a judge in chambers to make a decision after reading the affidavits filed. He argued further that the Respondents filed their *ex parte* application after being made aware of the current application per letter in which they sought to serve the spoliation application on the legal

practitioners of the Respondents as directed by their clients. He argued in the final that the filing of the *ex parte* application was abuse of process which should be visited with punitive costs.

The court reserved ruling on the interlocutory application made as it was not seized with the merits of the other matter and for fear that two judges of parallel jurisdiction may grant two mutually destructive orders. Pursuant to that the matter was brought before the attention of the senior judge for directions. It was directed that I deal and dispose of both matters. Accordingly, the matter of *SMC Fuels* v *Welcome Ndlovu and 2 o*thers HCBC1075/24 was allocated to me.

With that development, I made a ruling on the interlocutory application made in the *instant* matter. I ordered that the matters would not be consolidated but would be heard in *seriatim* starting with the first to be filed, *i.e* HCBC 1058/24, ending with the latest. The current matter was set down for the 4th September 2024 for hearing.

Point *in Limine.*

On that date Mr T. Moyo appeared for the Applicants stating that Mr Sithole was unavailable. Counsel for the Respondents Ms Mathaba rose first on a point *in limine.* She contended that the 1st Applicant's affidavit was defective as it contained hearsay evidence from the 2nd Applicant. She contended that the deponent of such affidavit had no independent knowledge of the facts he deposed to. She prayed that such was a fatal defect, which could not be cured by a supporting affidavit, and accordingly rendered the entire application a nullity. She relied on the matters of *Minister of Defence, Security & War Veterans Affairs (N.O)* v *Manyeruke, Minister of Defence, Security and War Veterans Affairs (N.O)* v *Dzikamai Chivhanga HH389-21 and Chiparaushe & Ors v Triangle Limited & Ors HH504-16*

The common principle in the matters cited above is the application of Rule 227(4)(a) of the High Court Rules 1971 which provides that,

"*An affidavit filed with a written application shall be made by the applicant or respondent, as the case may be, or by a person who can swear to the facts or averments set out in therein."*

The point *in limine* raised was opposed by Counsel for the Applicants who argued that the fact that Michael Sibanda deposed to a supporting affidavit, he buttressed the facts deposed to by Lovemore Ncube who is a representative of the applicant, a corporate body. *Mr Moyo* argued further that in fact the affidavit of Michael Sibanda ought to have been entitled "Founding

Affidavit" as for all purposes and intents he is a 2nd Applicant and accordingly deposing to facts personally known to him.

I drew the parties to section 27(1) of the Civil Evidence Act (*Chapter 8:01*) which reads as follows:

"*Subject to this section evidence of a statement made by any person, whether orally or in writing or otherwise shall be admissible in civil proceedings as evidence of any fact mentioned or disclosed in the statement, if direct oral evidence by that person of that fact would be admissible in those proceedings*."

Despite acknowledging such provision Counsel for the Respondents insisted on the defectiveness of Applicant's founding affidavit.

I dismissed the point *in limine* without much ado in an *ex tempo* ruling. My reasons are as follows.

In the present matter the Applicant is a body corporate. It cannot stand in court and speak. It can only do so through a representative duly appointed per a resolution of the directors. Lovemore Ncube herein is its appointed representative. He is clothed with authority to depose to the facts he does herein. He is not so much deposing to what happened leading to the taking of the assets of the Applicant, but so much on the peaceful possession and the lack of consent on the taking. This is so being mindful of the fact that 2nd Applicant as a driver, had no authority nor power to consent to the taking of a body corporate's property. He was not clothed with such a resolution, unlike Lovemore Ncube. In any event Lovemore Ncube states very clearly in paragraph 3.3

"*On the 18th of August 2024, I received a distress cell phone call from 2nd applicant, our company driver to the effect that he was under siege……I was out of Bulawayo then.*

3.4 I immediately set for Bulawayo to meet the driver in order to appraise myself of what exactly transpired.

3.5. I met the driver at the city centre and received certain information from him……"

With the above assertion this court is of the view that despite initially receiving a cell phone report, the deponent to the founding affidavit physically and personally attended to verify the facts that he later deposes to. While it is correct that he was not present when the truck and

trailers left the hands of 2nd Applicant, he certainly is in a position to confirm that it left the physical possession and control of the 1st Applicant his employer whom he speaks for. What he did not personally see, the 2nd Applicant deposed to a supporting affidavit confirming same. For that reason, even if he were to be called to testify, he can take oath and stand before court. The part of hearsay that he deposes to can be easily ascertained by calling the 2nd Applicant. The circumstances of this matter are highly distinguishable from those in the matters relied upon by Counsel for the Respondents. In the *Manyeruke* and *Chivanga* cases *supra* a legal practitioner sought to depose to issues that took place at his clients' offices before she was even instructed to handle the matters.

In the matter of *Johnstone* v *Wildlife Utilisation Services Ltd* 1966 RLR596 (G) @ 569-598 it was held thus:

"*It is accepted, in our practice, that the rules of admissibility of hearsay evidence applicable to interlocutory proceedings are not the same as those that apply to trial actions. Such evidence, given in affidavit form in such applications, is not necessarily excluded because it is hearsay, provided the source of the information is disclosed. As I understood or practice, it is this: first the court must examine the evidence given in this form and ascertain the prejudice which might result to the opposite party, if the evidence is later shown to be incorrect, would be irremediable, second, the court must examine to see whether there is some justification, such as urgency, for the evidence being placed before it in hearsay, and not direct form."*

I must state that in the present matter the evidence given as hearsay does not cause prejudice to the Respondents as the 2nd Applicant besides being disclosed also confirms it in his own affidavit as first hand evidence. (see also *Glenwood Heavy Equipment (Pvt) Ltd* v *Hwange Colliery and Others HH-664-16 and Church of The Province of Central Africa* v *Elson Jakazi and others HH-70-10)*

<u>On the merits.</u>

The facts of this matter are not so much subject to controversy. The following is common cause.

1. 1st Applicant is a corporate body registered in the Republic of South Africa.
2. 2nd Applicant is an employee of the 1st Applicant.

3. 2nd Applicant was in possession of a truck horse with its two trailers laden with coal in conduct of his day to day duties.
4. He was approached by the Respondents without any prior notice.
5. The two Respondents ultimately took hold of the truck keys thus immobilising the truck.
6. The two Respondents did not have a court order.

The 1st Applicant contends that through 2nd Applicant it was in peaceful and undisturbed possession of the truck, its trailers and the load. They contend further that such peaceful and undisturbed possession was interrupted by the 1st and 2nd Respondents unlawfully as they did not possess a court order. That 1st and 2nd Respondents are holding the truck as a lien for a debt they claim to have been accrued in the Republic of South Africa.

Opposing counsel stated that they act only for 1st Respondent. This means there is no opposition for 2nd Respondent. Counsel for 1st Respondent while confirming the taking of the truck, or rather its keys as they argue, deny that it was unlawful. They hold that indeed Applicant owes money to a South African company owned by 1st Respondent. That the amount is for fuel supplied to the 1st Applicant's truck through the facilitation of one Welcome Ndlovu who is the sole director of Applicant. It is further contended on behalf of 1st Respondent that the said Welcome Ndlovu consented to the taking of the truck as security for payment of the said debt. Further that; in fact, it is the said Welcome Ndlovu who instructed 2nd Applicant to go and park the truck at a truck stop, the 1st Applicant normally uses for its trucks while in Bulawayo, and to hand over the keys. It is argued that the 1st Applicant is now making an about turn in an effort to renege from the said agreement and ultimately to evade payment. Against 2nd Applicant it is argued that he is simply making up a story in pursuit of his employer's bid to evade payment.

The law.

In the matter of *Zondiwa Nyamande* v *Isaac Tamuka Mahachi and 3 Ors* SC-45-23 the Honourable Guvava JA held as follows:

"*Spoliation proceedings hail from a common law remedy which is meant to discourage members of the public from taking the law into their own hands* (*see Mswelangubo Farm (Pvt) Ltd & Ors* v *Kershelmar Farms (Pvt) & Ors SCB*-80-22. *Chiwenga* v *Mubaiwa* SC-86-20). *The remedy encourages members of society to follow due process in obtaining or acquiring*

any res they believe belongs to them in circumstances where they have been unlawfully disposed.

In the present matter the 1st Respondent claims to be owed money. He claims that his company has been engaging in business with 1st Applicant. From the nature of their transactions 1st Applicant's trucks would fuel in Bulawayo *en route* to Hwange or to the Republic of South Africa. In other words, he knew of the passage of 1st Applicant's trucks in Bulawayo. If indeed he is owed money, this court is of the view that he could have sought the intervention of courts of law to seek recourse.

In the matter of *Sheng An Mining (Pvt) Ltd* v *Mohamed Daka and Another* HB-65-24 Dube-Banda J held as follows:

"*Mandament van spolie* is the wrongful deprivation of another's right of possession. It is a possessory remedy. In this jurisdiction the requirements for *mandament van spolie* are settled. Briefly, an applicant needs to prove that: (i) he was in peaceful possession of the property; and (ii) that he was unlawfully deprived of such possession."

He went on to elaborate as follows:

"The purpose of this common law remedy is to prevent people from taking the law into their own hands *i.e* self-help. Critical to the remedy of spoliation is the notion of due process of law, i.e., to protect the person who apparently has a possessory right and to prevent disturbance of public peace. Due process requires that legal matters be resolved according to established rules and principles and that individuals be treated in accordance with the law."

In casu the second Applicant was peacefully in possession of 1st Applicant's truck, trailers and load. There is no point in time that his possession was put in dispute. Through 2nd Applicant, 1st Applicant was in peaceful possession of the *res.*

The act of way laying a truck on the road in whatever manner, is inappropriate. If it is true that it was done by way of a high speed-chase in vehicles with dark tinted windows, with a person or persons, dangling hand cuffs, that surely offends against the norms of an orderly society.

No matter how one looks at it, the conduct of 1st Respondent and his accomplice borders on nothing else than self-help, if not sheer thuggery. Surely such conduct cannot be condoned in any civilised society. I agree with the argument by counsel for the Applicants Mr. T. Moyo, that even if it were to be accepted that in the end the sole director for the 1st Applicant consented

to the taking of the *res* he did so under duress and under circumstances that amount to extortion. The inaction of the law enforcement agents at both Southampton Building and at Bulawayo Central Police station should have left 2nd Applicant feeling heavily let down and indeed vulnerable. For purposes of this application, it is suffice to only state that this court is satisfied that the dispossession was indeed violent.

Costs

Costs are generally awarded to a successful litigant to indemnify him or her for costs incurred as a consequence of litigation. In this case there is no reason why costs should not follow the result.

Disposition

In the circumstances, it is ordered as follows:

1.The application for spoliation be and is hereby granted to the 1st Applicant in terms of which:

a) It be and is hereby ordered that possession, charge and control of a motor vehicle registration numbers FXL 163 L and link trailers registration numbers LG52DS GP and LG 52 DH GP be and is hereby immediately returned to the 2nd Applicant together with its cargo, as to restore the *status quo ante*.

2.Failing a voluntary return of the properties described in paragraph 1(a) above, to the 2nd Applicant immediately, and in any event so soon as this order is served at SM Fuels, Fort Street/15th Avenue, Bulawayo, 3rd Respondent be and is hereby ordered and directed to seize by law, the properties afore described in paragraph 1 (a) above together with the respective vehicles' keys, and to soon thereafter hand over same to the 2nd Applicant respectively.

3. 1st and 2nd Respondents be and are hereby ordered to pay costs on a party and party scale, jointly and severally, each paying the other to be absolved.

Ncube Attorneys applicant's legal practitioners
Sengweni Legal Practice 1st respondent's legal practitioners