THOMAS MUTANO
versus
NYASHA MATSIKA
and
RUFARO MATSIKA

HIGH COURT OF ZIMBABWE
MAKONI J
HARARE, 15 and 17 June 2010

M. Kamdefwere, for the applicant
I. Ndudzo, for the respondent

Urgent Application

MAKONI J: The applicant approached this court seeking spoliatory relief against the respondents on a certificate of urgency. When I heard the matter, I granted the relief sought and gave my reasons ex tempore.

The respondent appealed against my decision and have requested for written reasons. These are they.

The applicant avers that on 27 May 2010, in the company of his wife, he drove his motor vehicle a Mercedes Benz ML 320 registration number 807-543N (the vehicle) into the premises of Premier Auto Services garage. He went to the enquiries desk. As he was there, the second respondent went to the vehicle and removed the ignition keys which he had left in the ignition. An altercation ensued between him and his wife on one side and the respondent on the other side. The second respondent was claiming that she had a business deal with the applicant's wife whereby his wife pledged his vehicle in the event of failing to pay some debt. The applicant reported the matter to the police but they were not of any assistance. The following day he obtained an *exparte* order from the magistrate court with the interim order ordering the release of the vehicle forthwith. Whilst the

messenger of court was trying to enforce the order, the respondents anticipated the return day. The magistrate who presided over the matter discharged the rule *nisi* for want of jurisdiction. The applicant then approached this court.

The applicant's wife filed a supporting affidavit whereby she confirmed having business dealings with the second respondent which then collapsed with the dolarisation of the economy. She confirmed that the applicant's position as to how the respondent seized the vehicle.

The respondents aver that the applicant and his wife owe them the sum of 17 800.00 and that the applicant pledged his motor vehicle. On the day in question, the applicant sent his wife to hand over the vehicle. The applicant only appeared after the vehicle was handed over voluntarily and wanted to despsoil the first respondent of the vehicle.

I will first of all deal with the points in *limine.*

In *limine* the respondents took the point that the urgent application was an unprocedural appeal against the decision of the magistrate court. They also averred that the applicant did not comply with rule 241(1).

Mr Ndudzo for the respondents submitted that the rule *nisi* had been discharged. If the applicant was aggrieved by that determination then he should either file a review or an appeal. The applicant had not abandoned the proceedings in the magistrate court and was instituting parrarell proceedings.

In reply Mr *Kamdefwere* submitted that the magistrate dealt with the matter solely on the issue of jurisdiction. It was not dealt with on the merits. The applicant accepted the decision and has therefore filed the present application before a court with …competent jurisdiction. The applicant cannot withdraw a matter which had been dismissed.

I agree with the submissions made on behalf of the applicant. The magistrate determined the matter. She ruled that court had no jurisdiction to deal with the matter and discharged the rule nisi. The applicant had two choices. Either to accept the decision or be aggrieved by the decision. If he was aggrieved, he would either file for review or appeal. If he accepted that the magistrate court had no jurisdiction then the next course would be to approach the appropriate forum. This is what he did. He would not be

expected to withdraw a matter where a determination was made. I will therefore dismiss the point in *limine.*

The second point was that the application did not comply with Order 32 Rule 24 (1) which requires that every chamber application "shall be accompanied by Form 29B duly completed……..”The Form 29B requires that the grounds of an application be clearly set therein.

I exercised my discretion as provided for in terms of R 4C which allows me to condone departure from the rules if satisfied that the departure is required in the interest of justice. I considered the circumstances of this matter and arrived at a conclusion that the application should stand.

Merits

The definition of the *mandament van spolie* as given by INNES CJ in *Nino Bonino v deLarge* 1906 TS 120 at 122 is pertinent. He states;-

> "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 enquiry or investigations into the merits of the dispute. It is not necessary to refer to any authority upon a principle so clear."

Despite the last sentence in the quotation by Innes CJ, I will add one authority from our own jurisdiction. In Botha *.Anor v Barrett* 1996 (2) ZLR 73 (S) at 79-80 GUBBAY CJ stated;-

" It is clear law that in order to obtain a spoliation order two allegations must be made and proved. These are;-

a) That the applicant was in peaceful and undisturbed possession of the property; and
b) That the respondent deprived him of the possession forcibly or wrongfully against his consent. (The court emphasis."

The onus rest on the applicant to establish the two essential elements of spoliation.

From the way I outlined the facts of this matter, it is clear that there is a serious dispute of fact as to what exactly happened. The applicant states that when he parked his vehicle at Premier Auto services garage and entered inside, the first respondent came and forcibly took the keys which he had left in the ignition. This was in the presence of his wife who was sitted on the passenger side. The respondents state that the applicant's wife voluntarily handed over the vehicle to them in the absence of the applicant. The applicant was therefore not physically deprived. The person who handed over the vehicle was not party to the proceedings.

I decided to adopt a robust approach and resolve the dispute of fact on the papers.

In my view, the respondents' version is highly improbable. They visit the garage for their own business. By coincidence, the applicant's wife arrives driving a vehicle previously pledged to the respondent by her husband. There was no prior arrangement that they meet at the garage. The first respondent approach the applicant's wife and they have a discussion which ended with the applicant's wife disembarking from the vehicle and handing over the keys voluntarily. I have had regard to the supporting affidavits to the respondent's affidavits and they do not assist.

The events must have happened as averred to by the applicant. He was in peaceful and undisturbed possession when the first respondent forcibly and wrongfully removed the keys from the ignition of the vehicle. These are people who had met by chance at the garage.

The applicant managed to establish the essential elements of mandamus van *spolie.* The parties consested to my granting a final order.

I therefore issued the following order;-

a) The first and second respondents shall immediately and forthwith restore the status quo ante as of 27 May 2010 by releasing and surrendering to the applicant, the motor vehicle namely Mercedes Benz M320 Registration Number 807-543N.
b) Each party shall bear its own costs.

Mutamangira & Associates, 1st & 2nd respondents' legal practitioner

Messrs Muringi Kamdwefere, applicant's legal practitioners