EVANS TAPFUMANEYI MUNYATI
vs
GODFREY MUGAYI

SUPREME COURT OF ZIMBABWE
CHIDYAUSIKU CJ, GARWE JA & OMERJEE AJA
HARARE, SEPTEMBER 3, 2012 & MAY 20, 2013

T Mpofu, for the appellant

T Magwaliba, for the respondent

OMERJEE AJA: This is an appeal against the judgment of the High Court, sitting at Harare, in which the appellant was ordered to restore possession of a Toyota Hilux motor vehicle registration number AAP 2222 to the respondent within 48 hours of service of the order and to pay costs of suit on an attorney and client scale.

The facts of this matter are as follows: In May 2010 the parties entered into an agreement in terms of which the appellant agreed to sell and the respondent agreed to buy a Toyota Hilux motor vehicle registration Number AAP 2222. The agreed purchase price was USD$4 000, 00 payable by an initial deposit of $2 000 and the balance in instalments. It is common cause that the appellant surrendered the vehicle and the vehicle registration book to the respondent after payment of the first instalment. Although it is not in dispute that at the time when the vehicle was surrendered to the appellant there was still a balance outstanding the exact amount thereof is in dispute. On 26 October 2010 the appellant regained possession of the

vehicle at the Jameson Hotel in Harare, prompting the respondent to apply to the High Court for an order of spoliation on 13 December 2010.

In his founding affidavit, the appellant averred that he had been unlawfully dispossessed of the motor vehicle by the appellant, who had been assisted in so doing by his brother, and their agent, one Makombe of Stoneriver Motors. At the time that the vehicle was taken away he had paid the sum of US$3.300 and had had undisturbed possession of the vehicle for five months. He had not voluntarily surrendered the vehicle to the appellant.

On the other hand, the appellant, in his opposing affidavit, stated that the surrender of the vehicle by the respondent to him on 26 October 2010 was done voluntarily and therefore there was no question of him having taken the law into his own hands. The respondent had only paid the sum of US$2 600, and, despite a further extension, failed to pay the purchase price in full. He accordingly demanded the return of the vehicle and its registration book. The respondent did not comply. His brother, one Garikai had then encountered the respondent by chance at the Jameson Hotel on 26 October 2010. Garikai then demanded the balance outstanding of $1 400, 00 and the registration book from the respondent. It was then that the respondent surrendered the motor vehicle to Garikai and promised either to go and retrieve the registration book or bring the sum of $1 400, 00 and settle the balance. The vehicle in the meantime was then parked at a neutral venue at Stoneriver Motors. The appellant denied taking the law into his own hands. He claimed that the surrender of the motor vehicle was with the consent of the respondent.

The court *a quo* granted the order of spoliation and costs on the higher scale. It is against that order that the appellant now appeals to this Court.

The issue for determination by this Court is a simple one. That issue is whether the court *a quo* erred or misdirected itself as alleged or at all in finding that there was sufficient evidence on the papers before it that the appellant had forcibly caused the respondent to surrender the motor vehicle to him against his will.

The rationale for an order of spoliation has been set out in various decisions of the courts in this jurisdiction. In ***Chisveto v Minister of Local and Town Planning* 1984 (1) ZLR 248 at 250F** REYHOLDS J quoted with approval the remarks of ***Innes CJ* in *Nino Bonins v De Lange 1906 TS120 at p 122 that:***

> "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 inquiry or investigation into the merits of the dispute".

Put simply, it matters not who actually owned the property, or what the dispute between the parties was, as long as respondent had possession in fact, which is not disputed, and was wrongfully dispossessed.

In *Oglodzinski v Oglodzinski* 1976 (4) SA 273 at p 274F, Leon J remarked:-

> "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. (*Nienaber v Stuckey*, 1946 A.D. 1049 at pp.1053, 1054). The *onus* lies upon the applicant to prove on a balance of probabilities that:
>
> (i) he was in peaceful and undisturbed possession of the property in question at the time of the alleged deprivation, and
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> (ii) he was unlawfully deprived of such possession."

In the present case the evidence reveals that the respondent was in factual possession of the motor vehicle at the time that he surrendered it to the appellant. There can be no doubt therefore that he was in peaceful and undisturbed possession at the time the vehicle was taken from him. The findings of the court *a quo* in this regard are unassailable.

The real issue, it seems to me, relates to the second requirement, that is, whether the respondent was wrongfully dispossessed of the motor vehicle.

It is common cause that the respondent bought the vehicle in question on credit and that at the time it was taken from him he had paid a substantial portion of the purchase price. The meeting at the Jameson Hotel had not been arranged but was fortuitous.

In coming to a decision, the court *a quo* took a robust approach of the facts and considering the probabilities concluded that it was inconceivable that the respondent would have parted with possession of the motor vehicle willingly in the manner he did following a chance meeting. I am inclined to agree with the conclusion by the court *a quo* that given the

circumstances, it is unlikely that the respondent would have willingly parted with the motor vehicle. That conclusion appears to me to accord with common sense. No basis has been shown upon which this finding can be impugned.

There is one further matter that requires consideration. That matter relates to the question of costs. The appellant did not appeal against the order that he pays the costs on the higher scale. Although the claim for such costs was made, no justification was given before the court *a quo* for such an award of punitive costs. Furthermore the court *a quo* did not give any reasons as to why it too agreed that such an order was warranted. In the circumstances of this case, I find no justifiable basis for such an award and would accordingly set it aside.

In the result it is ordered as follows:

1. The appeal is dismissed with costs.
2. The order of costs awarded by the court *a quo* is hereby set aside and substituted with an order for costs on the ordinary scale.

CHIDYAUSIKU CJ: I agree

GARWE JA: I agree

Debwe & Partners, appellant's legal practitioners

Magwaliba & Kwirira, respondent's legal practitioners