Judgment No. SC 36/18
Civil Appeal No. SC 279/16

REPORTABLE (30)

NGONIDZAISHE GUMBO
v
ZIMBABWE ANTI CORRUPTION COMMISSION

SUPREME COURT OF ZIMABWE
GOWORA JA, HLATSHWAYO JA & BHUNU JA
HARARE, NOVEMBER 24, 2016 & JUNE 19, 2018

T.K. Hove, for the appellant

J. Mumbengegwi, for the respondent

GOWORA JA:

The appellant was formerly employed by the Zimbabwe Republic Police as a police officer. He rose through the ranks and at the time of the dispute in issue he held the rank of Senior Assistant Commissioner. On a date not specified on the papers he was seconded to respondent as its Chief Executive Officer by the Office of the President and Cabinet. It would appear that the parties did not conclude a written contract providing for the second-ment.

On 14 March 2013 the Secretary for Home Affairs advised the respondent in writing that the Office of the President and Cabinet had directed that the appellant be recalled from his employment with the respondent and report to the Ministry of Home Affairs for immediate re-assignment. In addition, the appellant was, by letter dated 14 March 2013, directed to report to the said Ministry by no later than 15 March 2013.

On or about 18 March 2013 the appellant was arrested by the Zimbabwe Republic Police on certain allegations the details of which are not germane to the determination of this dispute. Following upon his recall and arrest, on 16 July 2013, the respondent addressed a letter to the appellant calling upon him to return to the respondent a Mercedes Benz ML350 motor vehicle, registration number ABE 9989 and an Isuzu D Tech KB 300 motor vehicle, registration number LLD 533(ABE 9841). The appellant did not comply.

On 29 July 2014, officers of the respondent accompanied by members of the Zimbabwe Republic Police arrived at the appellant's residence and obtained custody of the vehicles. On 15 May 2015, the appellant filed a court application with the High Court in terms of which he sought return of the two vehicles to himself. He alleged that he had been forcibly dispossessed of the vehicles by the respondent with the assistance of members of the Zimbabwe Republic Police who he alleged as having been heavily armed.

The High Court dismissed the application. The court *a quo* found that the appellant had acquiesced in the repossession of the two vehicles by the respondent. This finding was

premised firstly, on the indemnity document executed and signed by the appellant on the day the vehicles were retrieved and, secondly, on the delay between the repossession of the vehicles and the filing of the application for a *mandament van spolie* for their recovery.

The appellant has appealed the findings in question on the premise that he was unlawfully dispossessed and, further, that the delay in instituting the proceedings was reasonable in the circumstances as he was facing criminal charges and could not breach the conditions of the charges in question.

The court *a quo*, correctly in my view, came to the conclusion that the lawfulness of his possession was not a factor for consideration in an application for a *mandement van spolie* brought on the specific facts before the court. In an application for spoliation the court does not decide what the rights of the parties to the property were before the alleged spoliation. The only factors to consider were the possession and whether or not the appellant had been unlawfully deprived of the property in question. See *Magadzire v Magadzire* SC 197/98 wherein this court stated that spoliation had nothing to do with rights of ownership, but was concerned solely with possession and the unlawful deprivation thereof.

In a claim for a *mandament van spolie*, an applicant needs to establish the following:

i) that he or she was in peaceful and undisturbed possession; and

ii) that he or she was forcibly or wrongly deprived of such possession.

Once an applicant has established deprivation, it is incumbent upon the respondent to establish a defence. The only defences available in spoliation are the following:

a) that the applicant was not in peaceful and undisturbed possession of the thing in question at the time of the dispossession;
b) that the dispossession was not unlawful and therefore did not constitute spoliation;
c) that restoration of the thing is impossible;
d) that the respondent acted within the limits of counter-spoliation in regaining possession of the article; see *Kama Construction (Pvt) Ltd v Cold Comfort Farm Co-op & Ors* 1999(2) ZLR 19 at 21G-H.

In this case there is no dispute that the appellant was in peaceful and undisturbed possession of the two vehicles. In opposing the application however, the respondent had taken issue with the lawfulness of the continued possession of the vehicles by the appellant subsequent to his recall from the employ of the respondent. The appellant had contended that he had an entitlement to retain possession of the vehicles as they constituted benefits under his contract of employment with the respondent.

For present purposes based on the nature of the opposition the court had to consider whether or not the respondent's contention that it had not acted unlawfully was probable. The respondent placed reliance on an indemnity signed by the appellant on 29 July 2014 when the vehicles were taken away from him. The memorandum in question reads:

> "I Ngonidzashe Gumbo NR 63-361813-K03 of No. 6 Denham Close Highlands, Harare have surrendered (1) Isuzu KB 300 D-TECH REG NO ABE 9841, black in colour mileage 98444and (2) Mercedes Benz ML 350, metallic blue Reg No ABE 9989 mileage 79060 which were issued to me as the CEO of Zimbabwe Anti-Corruption Commission as part of my conditions of service, on the instruction of the Officer Commanding CID Homicide Harare."

In his founding affidavit the appellant averred that "the respondent with the assistance of heavily armed police officers had come to his house and demanded that he surrender the keys to the motor vehicles." He said the demand was vocal and no written letter demanding the return of the vehicles was availed to him. According to the appellant, the police had indicated that they did not require a court order or a letter as they were acting on the specific instructions of the respondent. Appellant said that given the attitude of the police, as a compromise he requested the police to write a document confirming that they had taken the vehicles as there was no court order authorizing the same. It is suggested by the appellant that this was the background to the origins and execution of the indemnity that he wrote and attached to his affidavit.

The principle behind spoliation is that no man should be permitted to resort to self-help as to do so would strike at the heart of the principle that the rule of law should be adhered to at all times. Consequently, if a person without being authorized by a court order dispossesses another person, the court without enquiring into the merits of the dispute will summarily grant an order for the restoration of possession to the applicant as soon as he has proved that he was in peaceful and undisturbed possession and that he was despoiled of possession by the respondent.

An applicant to an order for *mandament van spolie* has an *onus* to prove on a balance of probabilities that he was unlawfully deprived of the property which is the subject of the dispute.

Whilst the indemnity form signed by the appellant alleges that he surrendered the vehicles to the respondent on the instructions of one Majachani, the Officer Commanding CID Homicide, in his affidavit there is no mention of the role, if any that Majachani played in getting the appellant to surrender the vehicles. He implies that there was a heavy police presence accompanying the respondent. This statement is not amplified. There is no indication in the affidavit as to the number of police details who descended upon the appellant at his residence. He does not specify how many of the police details were armed, what they were armed with and whether such arms were exhibited to him. In short, despite alleging an unlawful deprivation of the vehicles, the appellant has refrained from providing sufficient material detail to the court and the respondent as would justify his claim that the surrender to the respondent was not voluntary but was induced by some force or threat.

In addition, it is not suggested nor can it be contested that the respondent is not a natural person. In the founding affidavit the appellant refers to the respondent as if it was a natural person. The appellant did not identify the person who came in the guise of the respondent to uplift the vehicles. Apart from making reference to the police presence, there are no specifics as to the acts done by any of the persons who came to his house that would constitute unlawfulness. In effect the court is left in the dark as to what actually transpired on the day in question. The appellant would by this invite the court to speculate. It is not the business of the court nor its function to speculate. It can only determine disputes on what litigants place before it. The appellant has not met the *onus* on the allegation relating to the unlawfulness of the recovery of the vehicles.

The court *a quo* found that from the manner in which the respondent regained possession of the motor vehicles, one could not impugn the lawfulness thereof. The learned judge in the court *a quo* found that the appellant had been allocated the motor vehicles as part of his conditions of service and that at the time that the vehicles were repossessed no contract was in existence. The court also found that the appellant had executed and signed a form of indemnity, which was handwritten and signed by the appellant. It was witnessed by Majachani and one Tichawona. The learned judge *a quo* concluded that from the totality of the evidence as set out in the papers the appellant would appear to have handed over the vehicles willingly given the employer employee relationship that had existed and which had been the basis upon which the appellant had originally acquired possession of the vehicles in question. The court also found that the delay by the appellant in bringing the application, viewed in conjunction with the surrender of the vehicles in the absence of a court order could be read as acquiescence to the dispossession.

In coming to the conclusion that it arrived at, the court *a quo* was guided by the dicta in *Jivan v National Housing Commission* 1977(3) SA 890, and followed in *Manga v Manga* 1991(2) ZLR 251(S), by this Court. A useful passage relating to the question of delay in bringing an application for spoliatory relief is found in *Jivan v National Housing Commission (supra).* At 893A-H, STEYN J states:

> "In my view the court has a discretion to refuse an application where on account of the delay in bringing it, no relief of any practical value can be granted at the time of the hearing of such application.
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> In exercising this discretion I think the bar imposed after one year in respect of the *mandament* consequential upon *complainte* is a guide to modern practice. If an applicant delayed for more than a year before bringing his application for *mandament* of *spolie*, there would have to be special considerations present to allow such applicant to proceed with his

application, and conversely, if an application was brought within the period of one year after interruption of the possession, special circumstances would have to be present before relief could be refused merely on the ground of excessive' delay. In the present matter the delay of eight months before the petition was launched is not so gross, nor had it such self-defeating consequences, that, on this ground alone, relief should be refused to the applicant.

Price, in his work, referred to above, states:
"It has been held that failure to take immediate action will estop the applicant from successfully claiming a spoliation order; he will be left to his remedy by action".

I cannot adopt this statement of the law without careful qualification. The learned author, Price, quotes as his authority the case of *Otto v Viljoen and Others*, (1885) 4 S.A.R. (Barber and McFadgne Reports 45), and *De Villiers v Holloway*, (1902) 12 C.T.R 566 at p. 569. The case of *Otto v Viljoen and Others*, is authority for no more than the self-evident proposition that a settlement between the party allegedly spoliated and the spoliator, precludes the party whose possession has been interrupted from seeking a spoliation order after the settlement was arrived at.

De Villiers v Holloway is more instructive. In this matter MAASDORP, J., considered the effect of delay in bringing an application for a *mandament* of *spolie* and he framed the argument for the view that a possessor loses his right to seek an order due to an inordinate delay in the following terms:

> "It is said that having lain by so long it must be taken that he acquiesced in what had been done by the respondent to such an extent as to deprive the conduct of the respondent of the character of forcible spoliation".

After considering the facts the learned Judge concludes:

> "therefore, the mere fact that the applicant did not press forward legal proceedings immediately was not such an acquiescence in what had been done by the respondent as to deprive the applicant of the right of now asking the court to put him in the position he would have been in had he not been deprived of peaceable possession by the respondent".

I adopt this approach. It is conceivable that the delay of an applicant to bring his petition either confirms or displays a state of mind in which the applicant acquiesced in the alleged disturbance of his possession, and, in such an event, I am satisfied that he would not be entitled to a *mandament* of *spolie*.

The delay in the present application cannot, in my view, by any means be interpreted as acquiescence in the alleged spoliation."

In his book, the Law of Property, the learned author, H Silberberg, states that as a general rule a possessor who alleges that he has been 'despoiled' must act immediately and before third parties have acquired a right or proprietary interest in the property in respect of which a spoliation order is sought.

In *Manga v Manga* (*supra*), this Court also had occasion to consider the question of what constituted delay in the bringing of the application and whether such would affect the grant of a remedy under the *mandament van spolie*. GUBBAY CJ said:

> "Finally, it was urged on the respondent's behalf that this court should decline to interfere with the judgment of the court *a quo*, on the ground that the appellant had failed to seek a spoliation order within a reasonable time after the date of dispossession, albeit the lodging of the application, on 10 July 1989, had been preceded by numerous demands of the property.
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> A similar argument was presented to STEYN J in *Jivan v National Housing Commission* 1977(3) SA 890(W). He considered that the bar of one year, which under the common law is imposed in the case of the *mandament van complainte*, should be a guide to modern practice as regards the *mandament van spolie*, but that the court was not necessarily bound to refuse an order sought after a year or allow an order if less than a full year had elapsed, especially if, on account of the delay, no relief of any practical value could be granted."

In this case, the appellant only launched the application on 15 May 2015, after a period of almost eleven months had elapsed. Prior to that he had addressed a letter to the Zimbabwe Republic Police, demanding return of the vehicles. The letter in question was dated 18 November 2014 and was written by his legal practitioners. Critically, the letter makes no mention that the appellant was unlawfully dispossessed of the vehicles in question, the suggestion being made that he was made to surrender them. It becomes necessary to quote the paragraph detailing the claim for the recovery of the vehicles as alleged by the appellant in the letter in question:

"Our instructions are that on or about 29th July 2014, either acting on your own initiative and/or the behest of the Zimbabwe Anti-Corruption Commission you caused our client to surrender two vehicles namely;

2.1 Isuzu KB 300 D-Tech Registration number ABE 9841 black in colour.

2.2 Mercedes Benz ML 350, Registration number ABE 0089 Metallic Blue in colour.

We are instructed that the said two motor vehicles were issued to our client as part of his conditions of service, which renders your intervention in this matter highly questionable as the vehicles in question were not seized pursuant to any known criminal investigation by your office.

We are further instructed that you had no legal right to dispossess our client of the vehicles in question as our client's contract of employment with the Commission still subsists and has not lawfully been terminated. Whilst we have been made aware of a purported recall of our client our client regards the same as a legal nullity in terms of Zimbabwean labour law and Constitutional provisions.

In light of the foregoing, our client is therefore entitled to full possession, use and enjoyment of the motor vehicles in question.

We have therefore been instructed to demand as we hereby do, that you restore the two vehicles into our client's possession on or before the 21st November 2014 failing which we are under strict instructions to file a court application seeking appropriate remedies."

It cannot be gainsaid that the appellant did not act as threatened in the letter. No action was in fact taken against the Officer Commanding CID Homicide, who was in fact the same Majachani who witnessed the execution of the indemnity form signed by the appellant. What is critical in my view is that no imputation of illegality on the part of Majachani is made in the letter referred to above. The legal practitioners make no reference to the heavily armed police force that allegedly descended upon the appellant. In relation to the deprivation of possession of the vehicles, the legal practitioners alleged that Majachani caused the appellant to surrender the vehicles. There is no allegation of force or illegality on the part of the police to make him surrender them.

Further to the above, there is no record of any demand being made to the respondent prior to the institution of proceedings. The appellant does not suggest that there was such demand made. As at the time that he launched the application, the vehicles had been assigned to his successor at the respondent's workplace. He does not explain in the founding affidavit why it took him close to a year before launching the application. *Mr Hove*, in his oral submissions suggested that the delay was occasioned by the appellant's desire to be done with the criminal proceedings first before pursuing the recovery of the vehicles. Clearly this was evidence from the bar which is not only irregular but it was never suggested by the appellant that he delayed due to his need to have the criminal matter disposed of first. In any event, even if it had been true such manner of dealing with the alleged spoliation would be contrary to the well-established principle of that an applicant seeking relief under a *mandament van spolie* needs to act with speed in order to obtain relief. Despite being legally represented from the onset the appellant did not see the immediacy of action on his part as a requirement or necessity.

In the affidavit opposing the application, the respondent took into issue the delay in approaching the court for relief. The respondent contended that the appellant had not acted expeditiously and was not entitled to relief. The appellant did not file an answering affidavit and can only be taken to have accepted that there was unreasonable delay in the launching of the application. In contrast, in Manga's case the application despite having been delayed was preceded by numerous demands for the return of the items of furniture which were the subject matter of the dispute. *In casu*, the appellant did not address a single demand to the respondent for the return of the vehicles.

The learned Judge in the court *a quo* exercised her discretion and took into account all the factors that are necessary in the determination of an application for a *mandament van spolie*. The delay in bringing the application was not explained in the affidavit and was only brought in in the grounds of appeal. Clearly there had been no foundation laid for the explanation that was set out in the grounds of appeal. In addition, an applicant to an order for spoliation has the *onus* to prove that he was outed unlawfully from possession. The appellant failed to discharge the *onus*. Apart from making reference to the police he made no specific averments as to the unlawful conduct which caused him to surrender the vehicles. In addition, to his knowledge, by the time he filed the application, the vehicles had been allocated to an employee of the respondent, and in these circumstances no relief of a practical value could be granted. The new possessor had himself not been cited and any dispossession of the vehicles in the absence of a court order would have in itself constituted an act of spoliation against him.

In the circumstances I find that the court *a quo* exercised its discretion properly and I find no reason to interfere with the exercise of such discretion. In my view the appeal lacks merit and should be dismissed.

In the premises the appeal is hereby dismissed with costs.

HLATSHWAYO JA I agree

T.K. Hove and Partners, appellant's legal practitioners.

Civil Division of the Attorney General's Office, legal practitioners for the respondent.