HH 294-21
HC 2818 /21

PREMIER AUTO SERVICES (PVT) LTD
versus
CLEAR CHOICE LOGISTICS (PVT) LTD
and
SANDRELLA SHUMBA
and
WILLIAM CHAITEZVI

HIGH COURT OF ZIMBABWE
MAFUSIRE J
HARARE, 10 June 2021

Urgent chamber application

Date of written judgment: 11 June 2021

Mr *T. Chagonda*, for the applicant
Mr *T.T.G. Musarurwa*, for the respondents

MAFUSIRE J

[1] The applicant seeks an order of spoliation. The subject matter is a certain Land Rover Discovery 5 motor vehicle. The facts are interesting. The applicant is a duly registered company. It is in the business of buying and selling motor vehicles, brand new or used. It also services them. The second respondent was at all material times the applicant's general manager until the dispute over this vehicle blew up in the last two weeks or so. She was suspended pending disciplinary proceedings against her. She opted to resign, citing incessant harassment. That put paid to the disciplinary proceedings.

[2] Whichever angle one looks at it, the second respondent is at the centre of the dispute to the hilt. She is a director and shareholder of the first respondent, a registered private company that is said to run an international trucking business. Until she left employment as aforesaid, she was the applicant's general manager. The third respondent is her husband. He is a co-director and shareholder with her in the first respondent.

[3] The applicant avers that the second respondent abused her office and authority as general manager. It avers that she surreptitiously sold, and illicitly caused, the delivery of the motor vehicle to the first respondent, the company that she co-owns and co-runs with her husband, the third respondent. The motor vehicle had come from a commercial bank, Standard Chartered Bank Zimbabwe Limited ("***the Bank***"). At the relevant time, the vehicle was in the applicant's premises. The applicant says it was in its workshop awaiting a full valet service (washing, cleaning, vacuuming, polishing, tidying, etc.) Before this, the applicant says it had completed a full service on the car and had taken it for an inspection by the Automobile Association of Zimbabwe ("***the AAZ***"). The applicant attaches copies of both the job card for the internal service by itself and the inspection report by the AAZ.

[4] The Bank had delivered this motor vehicle to the applicant's premises to sell on its behalf. The founding affidavit is deposed to by one Wesley Chingwena ("***Chingwena***"). He is a director of the applicant. He alleges that the Bank had given the applicant two options in respect of the sale of the vehicle on its behalf. The one option was for the applicant to sell to a third party. The other was for the applicant to buy it for itself. Chingwena says the applicant opted to buy the vehicle for itself. He says it duly communicated its option. The Bank accepted. The price was fixed. In either of the options, the Bank wanted $6 ½ million Zimbabwean RTGS. Chingwena says the applicant paid this amount. He attaches the proof thereof.

[5] Chingwena says, much to his shock and surprise, the second respondent sent him a message to advise that the first respondent, through her husband, the third respondent, had purchased the vehicle directly from the Bank and had already taken delivery. She herself had authorised the delivery. Metaphorically, the applicant saw red. It alleges the second respondent violated the internal standard operating procedures. Among other things, three signatures, including that of the Financial Director, had to be procured before the vehicle could be released. The applicant demanded the vehicle back. The respondents, through a letter from their legal practitioners, dismissed the demand. They alleged that they had legitimately bought the vehicle, paid for it and taken delivery. The applicant filed with the police a criminal report of theft of a motor vehicle. Nothing material became of that. Despite initial assurances by the police that the vehicle would be recovered and kept in safe custody until the resolution of the dispute,

nothing ever happened. The respondents did not return the vehicle. The applicant then brought the present application.

[6] The respondents deny any act of spoliation on their part. They allege that the first respondent's purchase of the vehicle, its collection by the third respondent following the authorisation by the second respondent, were all above board. The respondents' version is this. It was at the second respondent's instance that the vehicle was in the applicant's premises. Through her contacts at the Bank, she had secured for the applicant the agency to sell the vehicle for the Bank. It was displayed in the showroom. She advised the first respondent of it. It dealt directly with the Bank and secured a contract to buy it for the price required by the bank. It secured a credit facility from some South African company, Intessol (Pty) Ltd ("***Intessol***"), to fund the purchase. The purchase price was paid in two batches. The Bank was satisfied. It authorised the release of the vehicle to the first respondent.

[7] In paraphrase, the respondents' case is this. The applicant was a mere agent of the Bank to sell the vehicle for the agreed price. At all times the vehicle and its price were displayed in the applicant's showroom for any potential buyer to view. When the second respondent informed the third respondent of the availability of the vehicle, the first respondent decided to buy it. There was nothing irregular or untoward in the manner that she authorised the release of the vehicle. She did not need any other person's authority to cause the release of the vehicle. As general manager, she had those powers to do it all by herself. The authority of anybody else representing the applicant, if only for the purpose of releasing the vehicle, was irrelevant. The applicant was no more than a mere agent for the Bank. If the Bank, as the principal, authorised the release of the vehicle, then that was enough. That authority bound the applicant as the Bank's agent.

[8] The respondents allege that they are not in possession of the vehicle. They pledged it to Intessol as security for the loan. The applicant's criminal report was not pursued because the police were satisfied that the respondents had not stolen the vehicle and that, at any rate, they were not in possession of it. Thus, the order of spoliation sought by the applicant is incompetent because it will affect the rights of a third party, Intessol, that is not before the court. Any order of spoliation that does not include Intessol will be a *brutum fulmen*.

[9] Here is my judgment. Spoliatory relief is an old and very common civil law remedy. Nothing new or original can possibly be written about it anymore. The requirements are well known. They are stated here just for the record and to emphasise a particular aspect. Spoliation is a temporary remedy. It is designed to offer quick interim relief. The relief is preliminary to the suit on the merits. It is not aimed at the restoration of rights: see *Shoprite Checkers Ltd v Pangbourne Properties Ltd* 1994 (1) SA 616 (W). It does not decide the rights of the parties. Evaluation of such rights is reserved for the suit on the merits of the dispute: see SILBERBERG AND SCHOEMAN'S *The Law of Property*, 5th ed., para 13.2.1.2, p 288-290. In some of my previous decisions[1] I have likened temporary relief to a pain killer that one takes to relieve pain for the time being pending major surgery.

[10] Spoliation does not have an interlocutory nature. It is a final determination of the immediate right to possession: SILBERBERG AND SCHOEMAN, *ibid*, p 290. Most legal advisors and drafters of pleadings often get mixed up. The *mandament van spolie*, as a remedy, is often claimed on an urgent basis. The draft order, also as in the present application, typically seeks an interim relief and a final order on the return date. That is wrong. The draft order should seek final relief only. If the applicant shows that he or she was in possession of the thing and that it was illicitly taken away, or ousted, i.e., despoiled from him or her, then he or she becomes entitled to relief: *Scholtz v Faifer* 1910 TS 243. There is a glut of cases on the point. The order that the court grants is not provisional. It is final. The applicant proves the elements of spoliation on a balance of probabilities. The remedy is designed to restore at once possession that has been deprived unlawfully: see *Kama Construction (Pvt) Ltd v Cold Comfort Farm Co-operative & Ors* 1999 (2) ZLR 19 (SC).

[11] The rationale of spoliation as a quick remedy is to prevent anarchy in society: see *Muller* v *Muller* 1915 TPD 29. People must not resort to self-help each time they want to recover things they feel belong to them but may be in the possession of another. No one is permitted to dispossess another forcibly or wrongfully or against their consent. If that happens, the court "… *will summarily restore the status* quo ante *and will do that as a preliminary to*

[1] For example, *Cawood v Madzingira & Anor* HMA 12/17; *Main Road Motors v Commissioner-General, ZIMRA* HMA 17/17 and *Timvios & Anor v Mwonzora & Ors* HH 370/20

any enquiry or investigation into the merits of the dispute": see *Shoprite Checkers Ltd*, *supra*, at 619 (H).

[12] *In casu*, the respondents' argument that once they had the consent of the Bank, as owner of the car, and principal of the applicant, to remove the car from the applicant's premises, it was all that they needed, is imaginative. They rely on some correspondence between the Bank and themselves that seems to support that argument. But this is all smoke. The defence practically fizzles out when the nuts and bolts of the case are considered. The second respondent used her workstation's lap top to communicate with the Bank. She used her business address. Whatever instruction the Bank gave her, it was on behalf of the applicant, not herself in her individual capacity. When the applicant approached the Bank, it refuted all suggestions that it had authorised the release of the vehicle to the first respondent via communication with the second respondent in her individual capacity. It promptly refunded the money the respondents had paid as purchase price. Of course, the respondents accuse the Bank of approbating and reprobating on the deal. They make veiled threats of legal action. But plainly, that has no bearing on the applicant's right to a spoliation order.

[13] What the respondents did was classically an act of spoliation. I am satisfied from the totality of the applicant's evidence that, contrary to their assertions, such a high value vehicle could not just be released from the applicant's workshop or showroom on the second respondent's single signature. She was not the last line of managerial authority. I accept the applicant's averments that she ought to have procured the authority of two other senior managers. What she did was classically an abuse of authority. *Mr Musarurwa*, on behalf of the respondents, argues that the second respondent's actions may have fallen short of the precepts of good corporate governance, but that this does not in any way have a bearing on the respondents' defence to spoliation. I do not agree. Demonstrably, in her own private business operations she was leveraging on her position as general manager for the applicant. She was exploiting her employer's time; equipment; goodwill; stationary, and so forth. She procured and released the vehicle, not to an innocent and independent third party, but practically to herself. The release of the vehicle was done stealthily or illicitly. It was without the knowledge and consent of the applicant. The applicant had peaceful and undisturbed possession at all relevant times. It had exercised one of the options given to it by the Bank, namely to buy the

vehicle for itself. The second respondent may not have known this because she was not the last line of managerial authority. The applicant had spent money in servicing the vehicle and procuring an AAZ report. At the very least, it was entitled to keep the vehicle until it was reimbursed its money, or suitable arrangement made in respect thereto. It was not the consent of the Bank that mattered. It was not the Bank that was in possession. It was the consent of the applicant that counted. The defence of consent cannot succeed.

[14] The respondents' argument that any order of spoliation against them will be a *brutum fulmen* because they do not have possession of the vehicle themselves but Intessol, is a red herring. I leave open the question whether in the event that a court somehow knows in advance that its order will become a *brutum fulmen per se* it will refrain from issuing it. That situation does not arise in this case. What arises is whether it is impossible for the respondents to restore possession of the vehicle to the applicant if the court orders them to do so. Their inability to do so is not measured on the basis of their subjective protestations. It is measured objectively, taking into account all the surrounding circumstances. In cases where the spoliator has alienated the thing to a third party, the *mandament van spolie* can still be granted unless the spoliator proves that it is impossible for him or her to carry out the court's order: see *Painter v Strauss* 1951 (3) SA 307 (O). SILBERNERG & SCHOEMAN, *ibid*, p 305, say that where the spoliator can regain possession of the thing without much trouble or delay, the order of spoliation should be granted.

[15] *In casu*, the answer lies in the detail. Before the litigation, in the response to the applicant's demand for the return of the vehicle, the respondents' legal practitioners claimed the respondents were not in a position to comply because they were not in possession of the vehicle on account of the fact that they were buying it through a loan facility and that only after their liability had been discharged to the third party would the vehicle be released. The actual person who had custody of the vehicle was not disclosed. Then in the present application, the respondents attach a copy of their finance agreement with Intessol to support the argument that in terms of their commitments to Intessol, they cannot cause its release without breaching that agreement. Apparently, it was intended to register a notarial bond over this vehicle and one other not mentioned. But as Mr *Chagonda*, for the applicant, highlighted during argument, clause 9.2 of the finance agreement between the respondents and Intessol says that pending the

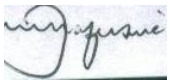
registration of the notarial bond, the vehicles shall be held in pledge by the borrower. 'Borrower' refers to the respondents. Mr *Musarurwa* argues that the word 'pledge' in that clause should be read and understood in its technical legal sense, meaning a thing that is given as security in fulfilment of a contract. A pledge is complete only when accompanied by delivery of the thing. However, the difficulty with this approach is that the respondents do not say that. They are not disclosing where exactly the vehicle is. From its letterhead, Intessol is a South African company the physical address for which is in Bryanston, Johannesburg. At any rate, the Bank has returned the respondents' money upon denying the existence of an agreement between it and the respondents. Nothing has been said by the respondents why they cannot refund Intessol, get back the vehicle from wherever it is, and deliver it to the applicant.

[16] The respondents have no defence to the application for spoliatory relief. The applicant is entitled to an order in terms of the draft as amended in two respects namely, that the original interim relief becomes the final order, and that some extra words be added to empower the Sheriff to seize the vehicle in the event that the respondents do not comply, and deliver it to the applicant. Mr *Musarurwa*, upon being given the chance to react to the application for this amendment, displayed maturity by not opposing the substance of the amendment, only stressing that even in its amended form, the final order should confine itself to the respondents only. In the circumstances the following order is hereby made:

i/ The respondents shall return to the applicant the Land Rover Discovery 5 motor vehicle, Reg. No. AEX 1156 forthwith upon service of this order, failing which the Sheriff or his lawful deputy or assistant deputy, shall be authorised, directed and empowered to seize the motor vehicle and deliver it to the applicant.

ii/ The costs of this application shall be borne by the respondents jointly and severally.

11 June 2021



Atherstone & Cook, applicant's legal practitioners
M.C. Mukome Legal Practitioners, respondents' legal practitioners