JUDITH GEZA
versus
ASSISTANT INSPECTOR KHUMALO
and
DUMISANI NHONGO

HIGH COURT OF ZIMBABWE
NDOU J
HARARE 30 July and 2 August 2002

Urgent Application

Mr *P. Masamba,* for the applicant
Mr *N. Mutsonziwa,* for the 1st respondent
Ms *E. Ndewere,* for the 2nd respondent

NDOU J: The applicant seeks a spoliation order in the following terms:

"Pending the final determination of the application, it is ordered that:

1. First Respondent, or Second Respondent, or both be and are hereby directed to deliver the motor, a Mitsubishi Pajero Registration No. 754 979D, to Canaan Farirai Dube's possession at Parking Bay 294B Eastgate, Sam Mujoma Street, Harare, within forty-eighty (48) hours of this Order being served on one or both of them.

2. Failing which leave be and is hereby granted to applicant to approach this Honourable Court on the same papers, for an order declaring First and Second Respondents to be in contempt for which a custodial sentence of three (3) months will be issued, suspended for forty-eight (48) hours to allow both Respondents to surrender the vehicle in terms of this Order."

The terms of the final order sought are:

"That you show cause why a final order should not be made in the following terms:

1. Canaan Farirai Dube and/or Applicant shall keep possession of a Mitsubishi Pajero Registration No. 754 979D, at Parking Bay 294B, Sam Mujoma Street, Harare, in accordance with the terms of the Agreement between Applicant and Second Respondent conducted on or around 3 March 2002.

2. Both Respondents be ordered to pay applicant's costs in this matter on attorney/client scale, jointly and severally, the one paying the other to be absolved."

On 2nd August 2002 I dismissed the application with costs and I now give reasons for my decision.

There seems to be no dispute on the question of urgency. Having regard to the circumstances of the case I am satisfied that the matter is urgent. The salient facts of the case are that on or about April 2001, the applicant, Ms Geza, represented by an agent known as Mr Mbano, entered into an agreement to purchase the Mitsubishi Pajero Registration Number 754-979D from the second respondent, Ms Nhongo. Consequently, Ms Geza paid Ms Nhongo the purchase price as follows:

(a) $500 000 by cheque drawn by her bankers, Zimbank, in favour of Ms Nhongo dated 2 April 2001;

(b) $1 million by cheque dated 4 July 2001 similarly drawn on Zimbank in favour of Ms Nhongo;

(c) $1 700 000 by cheque drawn on Zimbank in Ms Nhongo's favour.

The Registration Book and Insurance Cover Note, although still in Ms Nhongo's name are in Ms Geza's possession.

On 6 March 2002 Ms Nhongo's legal practitioners returned the above amounts in one lump sum payment of $3,2 million to Ms Geza's legal practitioners.

Ms Nhongo reported to Southerton Police that Ms Geza had stolen the abovementioned motor vehicle. The criminal matter was subsequently moved to Marlborough Police where first respondent, Assistant Inspector Khumalo is stationed. The criminal matter was initially investigated by a Constable Makombe. Ms Geza and Ms Nhongo, acting through their respective legal practitioners, entered into an arrangement whereby, pending the resolution of both the criminal and civil matters, the motor vehicle would be kept at Bay 294B Eastgate Complex (where offices of Ms Geza's legal practitioners are situated) while the ignition key would be kept by Ms Nhongo's legal practitioners. It is clear that the objective of this unusual arrangement of co-possession was to ensure that the vehicle is not disposed of by either party prior the determination of the pending criminal and civil matters. The terms of this arrangement were communicated to Inspector Mkungunugwa of Marlborough Police. The latter police were investigating Ms Geza on an allegation of theft of the said vehicle levelled against her by Ms Nhongo. Their reference number is CR 13/2/02. As alluded to earlier on, Constable Makombe was the initial

investigating officer but Assistant Inspector Khumalo has since been assigned to take over the investigations. It is the first respondent's case that he was acting in his capacity as the investigating officer when he took the vehicle from the parking bay in Eastgate and later handed it over to Ms Nhongo for safe custody. The objective, as was the case with the earlier arrangement between Ms Geza and Ms Nhongo, was to ensure that the vehicle is not disposed of by either party prior the determination of the pending criminal matter. The first respondent's case is that he has merely changed the method and place of the safe custody guided by the provisions of sections 49 and 58 of the Criminal Procedure and Evidence Act [*Chapter* 9;07].

In determining this application I proposed to first deal with the protection of possession and then deal with the impact of the provisions of section 49 and 58 on such possession.

Mandament van spolie or a spoliation order is the only true possessary remedy in our law – see *Muller v Muller* 1915 TPD 28 at 30 to 31; *Malan v Dippenaar* 1969 (2) SA 59 at 64G – H; *Boompret Investments v Paardekraal Concession Store* 1990 (1) SA 347 (A) 353 and Silberberg and Schoeman's *The Law of Property,* 3 ed. by DG Kleyn and A Borraine at page 129.

The purpose of the *mandament van spolie* is to restore unlawfully deprived possession *ante omnia* to the possessor, in order to prevent people from taking the law into their own hands – ee *Mans v Marais* 1932 CPD 352 at 356; *Mbuku v Mdinwa* 1982 (1) SA 219 (TK) 220G; *Beukes v Crous and Another* 1975 (4) SA 215 (NC); *Chisveto v Minister of Local Government and Town Planning* 1984 (1) ZLR 248 at 250B – D; and *Nino Bonino v de Lange* 1906 TS 120 at 122.

In *van t'Hoff v van t'Hoff and Others* 1988 (1) ZLR294 at 296B – C GIBSON J stated as follows:

> "It is well established that in spoliation proceedings, all that the applicant needs to prove is that –
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> (i) he was in peaceful and undisturbed possession of the property; and
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> (ii) that he had unlawfully deprived of such possession.
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> Once the applicant has proved those two elements, the applicant is entitled to have the status quo ante restored. See: *Burnharm v Neumeryer* 1917 TPD 630; *Neinaber v Stuckery* 1946 AD 1049 … It is well settled that in spoliation proceedings the fact that a person has rights as owner of the property is an irrelevant consideration: *Badenhorst v Badenhorst* 1964 (2) SA 676 (T); *Buck v Buck* 1974 (1) SA 609: 1973 (2) RLR 315 (GD)."

It was further stated by ADAM J in *Davis v Davis* 1990 (2) ZLR 136 (HC) at 141B – C as follows:

> "Further, in order for the applicant to obtain a spoliatary remedy it was said by Herbstein J in *Kramer v Trustees Christian Coloured Vigilance Council, Grassy Park* 1948 (1) SA 748 (C), at 753 that:
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> > "... two allegations must be made and proved, namely, (a) that 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."

1. Was the applicant, Ms Geza, in peaceful and undisturbed possession of the vehicle?

Ms Geza, as the applicant, must prove that she was in possession of the disputed motor vehicle on a balance of probabilities – see *Yeko v Qana* 1973 (4) SA 735 (A) at 739G; *Hall v Pitsoane* 1911 TPD 853 at 857; *Shaw v Jendry* 1927 CPD 357 at 359; *Oglodzinski v Oglodzinski* 1976 (4) SA 273 (D) and *Magadi v Wedst Rand Administration Board* 1981 (2) SA 352 at 354D. I have outlined that in this case Ms Geza's legal practitioners had the disputed vehicle in his parking in his parking bay and Ms Nhongo's legal practitioners had the ignition key. This type of arrangement seems to create co-possession of the disputed vehicle by Ms Geza and Ms Nhongo. Ms Geza need not prove exclusive possession since such co-possession will suffice – see *Brighton v Clift* 1970 (4) SA 247 (R); *The Law of Things* – by CG van der Merwe (Butterworths) 1987 page 57 paragraph 61; *Manga v Manga* 1991 (2) ZLR 251 (SC) at 253C – H; *Rosenbuch v Rosenbuch and Another* 1975 (1) SA 181 (W) at 183D – G and *Oglodzinski v Oglodzinski* case (*supra*) at 276B. I am satisfied the applicant has established the *corpus* and *animus* elements which are necessary to constitute the kind of possession which qualifies for protection against spoliation. Ms Geza was in peaceful and undisturbed co-possession of the vehicle with Ms Nhongo. As illustrated above such co-possession is possible and Ms Geza would, in the circumstances, be entitled to a possessory remedy even against her co-possessor, Ms Nhongo.

2. Was there Spoliation by either Respondents?

The onus is also on the applicant to prove that an act of spoliation was committed by the respondents. This must be proved on a balance of probabilities as a *prima facie* will not suffice – see *Bennett Pringle (Pty) Ltd v Adelaide Municipality* 1977 (1) SA 230 (EC) 232F – G and *Moloisane v West Rand Administration Board* 1980 (1) SA 372 W at 275H.

In this case Ms Geza was, strictly speaking, deprived of the possession by Assistant Inspector Khumalo in the course of his investigations of the criminal matter. From the police docket submitted during the hearing it is clear that Marlborough Police completed their investigations and referred the docket to the Public Prosecutor's Office at Harare Magistrates Court. An officer in latter perused the docket and gave instructions that the police arrest the applicant and charge her with theft by false pretences. It was also instructed that the disputed vehicle be recovered. Apparently acting on these instructions, and in complete disregard of the earlier arrangement between Ms Geza and Ms Nhongo, Assistant Inspector Khumalo deprived the applicant of her possession of the vehicle. The question is whether this action by Assistant Inspector Khumalo amounts to spoliation. In this regard the definition of INNES CJ in *Nino Bonino v de Lange (supra)* at page 122 is pertinent:

> "The best definition I have been able to find is one given by Leyser, who states that spoliation is any illicit deprivation of another of the right to possession which he has, whether in regard to moable or immovable property or even in regard to a legal right."

See also *Goldsmith v Irwin* (1907) 17 CTR 444 at 445; *Yeko v Qana (supra)* at 739G; *Adamson v Boshoff* 1975 (3) SA 221 (C) at 230B and *Mankowitz v Loewenthal* 1982 (3) SA 758 (A) at 767A. Is what Assistant Inspector Khumalo did illicit? His attitude is that he is not bound by the arrangement between Ms Geza and Ms Nhongo. As alluded to earlier he places reliance on sections 49 and 58 of the Criminal Procedure and Evidence Act. I agree that whatever arrangement that Ms Geza and Ms Nhongo made, they cannot override the express provisions of the Criminal Procedure and Evidence Act. Do these two sections empower Assistant Inspector Khumalo to act in the manner that he did?

Section 49 provides:

"The State may, in accordance with this Part, seize any article –

(a) which is concerned in or is on reasonable grounds believed to be concerned in, the commission of an offence, whether within Zimbabwe or elsewhere; or

(b) which it is on reasonable grounds believed may afford evidence of the commission or suspected commission of an offence; whether within Zimbabwe or elsewhere; or

(c) which is intended to be used or is on reasonable grounds believed to be intended to be used in the commission of an offence."

Section 58 provides:

"A police officer who seizes any vehicle referred to in section *forty-nine* or to whom any such article is delivered in terms of this Part or to whom an article seized in terms of any other enactment is delivered to be dealt with in terms of this Part –

(a) many, if the article is perishable, with due regard to the interests of the persons concerned, dispose of the article in such manner as the circumstances may require; or

(b) may, if the article is stolen property or property suspected to be stolen, with the consent of the person from whom it was seized, deliver the article to the person from whom, in the opinion of such police officer, such article was stolen, and shall warn such person to hold such article available for production at any resultant criminal proceedings, if required to do so; or

(c) shall, if the article is not disposed of or delivered in terms of paragraph (a) or (b), give it a distinctive identification mark and retain it in police custody or make such other arrangements with regard to the custody thereof as the circumstances may require."

In dealing with whether the deprivation of possession by first respondent amounts to spoliation the purpose of the *mandament van spolie* must be contextually appreciated. REYNOLDS J, in *Chisveto v Minister of Local Government and Town Planning (supra)* at page 250C – F stated as follows –

"The purpose of the *mandament van spolie* is to preserve law and order and to discourage persons from taking the law into their own hands. To give effect to these objectives, it is necessary for the status *quo ante* to be restored until such time as a competent court of law assesses the relative merits of the claims of each party. ... The oft cited and approved passage of INNES CJ in *Nino Bonino v de Lange* 1906 TS 120 at 122 is pertinent:

"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."."

In this case, the first respondent was not "taking the law into his hands". He purported to act as police officer empowered by provisions of sections 49 and 58 of the enabling legislation i.e. the Criminal procedure and Evidence Act. The question of preservation or protection public order does not arise.

It seems to me that section 49 empowers the first respondent to seize the motor vehicle in question during the course of his investigations. To show his *bona fides* he produced a Police docket in this matter indicating the stage of his investigations and directions given by Prosecutor's Officer. The Attorney General through his delegate has decided to prosecute the applicant for theft by false pretences i.e. according to information in the Police docket. This discretion is not subject to interference from any person – see section 76(4)(a) of the Constitution of Zimbabwe. The Attorney General's delegate has given written instruction to Assistant Inspector Khumalo to charge Ms Geza with theft by false pretences and recover the disputed vehicle. I do not think that Assistant Inspector Khumalo did anything legally wrong. I think out of courtesy ideally he should have informed Ms Geza and Ms Nhongo's legal practitioners that he was taking the vehicle in terms of the provisions of section 49. He had no legal obligation to do so. Coming to the disposal of the vehicle, Mr *Mutsonziwa,* for the first respondent seems to be relying on the provisions of section 58(b).

Firstly, section 58(a) is not applicable in this matter as the exhibit is not perishable.

Secondly, section 58(b) is not applicable because this route can only be used "with the consent of the person from whom it was seized". The vehicle was seized from Ms Geza and she did not consent to the vehicle being given to Ms Nhongo. Section 58(c) appears to be the only one relevant in this case. Section 58(c) empowers a police officer to "make such other arrangement with regard to the custody thereof as the circumstances may require". The first respondent's case is that after taking the vehicle the question of custody thereof at Marlborough Police Station became a problem. Assistant Inspector Khumalo, in exercise of discretion bestowed on him by section 58 authorised that release of the disputed vehicle into the custody of Ms Nhongo on condition that the latter brings it to court on date of the criminal trial. It does not seem to me to be the wisest thing to do in the circumstances but that is not the issue before me. I am not required to judge

whether he exercised his discretion wisely. His exercise of the discretion is, in my view, not legally assailable. As indicated earlier on his objective is to ensure that the vehicle is available for purposes of criminal proceedings. There is nothing on the papers which shows that Ms Nhongo was part of the removal of the vehicle from Eastgate by Assistant Inspector Khumalo. Once it is established that Assistant Inspector Khumalo's conduct does not constitute spoliation it then follows that the claim against Ms Nhongo is not sustainable.

In light of my above findings I accordingly dismissed the application with costs.

Dube, Manikai & Hwacha, applicant's legal practitioners.
Civil Division – Attorney General's Office, first respondent's legal practitioners.
Mucharehwa & Partners, second respondent's legal practitioners.