

EVERTON MASAU  
versus  
SHEILA MABASA  
and  
TINEYI CHANGUNDUMA

HIGH COURT OF ZIMBABWE  
MATANDA-MOYO J  
HARARE, 19 & 21 June 2017

**Urgent chamber application**

*AA Makore*, for the applicant  
*N Mugiya*, for the respondents

MATANDA-MOYO J: This is an application for a spoliation order which order was sought on an interim basis.

The applicant alleged that he was in possession of his Mercedes Benz C240 registration number ACD 9022 which was unlawfully taken away from him by the respondents on 10 May 2017. He sought that the car be returned to him. The respondents raised a preliminary point namely that the application before me is defective in nature, in that it seeks to obtain the remedy of spoliation on an interim basis. The application seeks the order on the basis of a *prima facie* right as opposed to a clear right as envisaged by law. In that respect the respondents argued that the application fails to comply with r 241 (1) of the High Court Rules of Zimbabwe.

The other preliminary points taken cannot be sustained. The respondents submitted that the applicant deposed to an affidavit on behalf of others. However it is clear that the applicant deposed to the affidavit on his own behalf and such affidavit was properly commissioned.

The respondents submitted that the matter cannot be resolved on papers as there are material disputes of facts. The applicant based his claim on spoliation that is that he was in peaceful and undisturbed possession of his motor vehicle and that the respondents unlawfully dispossessed him of same. The issue of material disputes of facts has been prematurely taken, and cannot be granted without hearing the parties.

Non citation of the Registrar in an application of this sort is not fatal to the proceedings and I dismiss that point *in limine* that the matter be dismissed on the reason of non-citation of the Registrar.

Let me turn to deal with the issue of whether the remedy of spoliation can be sought on an interim basis. I have noted that the order is being sought on an interim basis. A spoliation order is final in nature. Spoliation was described in *Nino Benino v De Lange* 1906 TS 120 at 122 as “any illicit deprivation of another of the right of possession which he has, whether in regard to movable or immovable property or even in regard to a legal right”. In that regard it is final in nature see *Nienaber v Stucky* 19948 AD 1049.

Spoliation is a possessory remedy. It is only possession of a party that is protected, the rationale being that no man is allowed to take the law into his own hands. To allow that would render this planet unliveable See *Tswelopele Nan Profit Organization and Ors v City of Tshwane Metropolitan Municipality & Ors* 2007 (6) SA 511 (SCA) the court said:

“Under it, anyone illicitly deprived of property is to entitled to be restored to possession before anything else is debated or decided (*spoliticus ante omnia restitendus est*). Even an unlawful possession – a fraud, a thief or a robber – is entitled to the *mandaments* protection. The principle is that illicit deprivation must be remedied before the courts will decide competing claims to the object on property.”

Therefore the relief of spoliation is final in nature and cannot be sought on an interim basis. See also *Shelving Man (Pvt) Ltd v Sayed Dairood & Ors*. This means that since the applicant premised his application on a *prima facie* right as opposed to a clear right, the remedy cannot be sustained. See also remarks by MALABA DCJ, as he then was, in the case of *Blue Ranges Estates (Pvt) Ltd v Muduvivi and Anor* 2009 (1) ZLR 368 (S) at 377 F-G where he said:

“The issue of an order in the form in which it was applied for does not make the order itself a provisional order. For an order to have the effects of an interim relief it must be granted in aid of, and as ancillary to the main relief which may be available to the applicant on the final determination of his or her rights in the proceedings.

It has been the realisation of the fact that a spoliation order disposes of the issue or portion thereof between the parties that authorities say that it is a final and definitive order. See also Herbstein & Van Winsen *Civil Practice of the Supreme Court of South Africa* 4 ed state p 1064.”

Even if I had gone into the merits of the matter I was still not going to grant the relief sought as applicant has failed to prove spoliation. There are many questions to be asked to the applicant for example, why did he follow the respondents? When he had a tyre puncture why

did he not go to the nearest garage? How was the vehicle taken away from him? The applicant has failed to show that he did not voluntarily surrender his vehicle.

I am of the view that firstly the application fails on the basis that a spoliation order cannot be sought nor granted on an interim basis, and secondly that there is no evidence to prove that the applicant was in peaceful and undisturbed possession of his vehicle and that such vehicle was unlawfully taken from him.

In the result I order as follows:

The application is dismissed with costs.

*Munangati and Associates*, applicant's legal practitioners  
*Mugiya & Macharaga Law Chambers*, respondent's legal practitioners