ITAI DORINE NGWERUME
versus
CITY OF HARARE
and
MINISTER OF LOCAL GOVERNMENT, PUBLIC WORKS
AND NATIONAL HOUSING N.O.

HIGH COURT OF ZIMBABWE
MAXWELL J
HARARE, 28 February & 22 March 2023

Urgent Chamber Application – Spoliation

ST Mutema, for applicant applicable
A Moyo & P Nkomo, for 1st respondent
No appearance for 2nd respondent

MAXWELL J: On the 1st of March 2023, I dismissed this application. On 7 March 2023 a letter requesting a reasoned judgment was placed before me. This is it.

FACTS

Applicant approached this court on an urgent basis seeking spoliation in terms of Rule 60 of SI 202 on 2021. She sought an order that first respondent be ordered to release her vehicle registration number ADP 8306 without any fine and/or storage charges being payable to it. She also sought costs of suit on an attorney and client scale. She averred that on 20 February 2023 she parked the said vehicle along Robert Mugabe Road in a parking bay. First respondent's municipal police opened her door and advised her that she was under arrest for parking her vehicle in a bay designated for taxis. She tried to reason with the officer but the vehicle was impounded and before it was towed away, she was issued with a notice which advised her that the vehicle was impounded and taken away by City of Harare and that she could pay the fine at Rowan Martin or Cleverland (sic) House. The prescribed penalty was US$50. In addition she was required to pay tow away fees of US$100.

Applicant contested the legality of the first respondent's actions. She averred that the

towing away is *ultra vires* the parent act, the Municipal Traffic Laws Enforcement Act [*Chapter 29:10*]. She argued that there was no indication by either road sign or designated marking that the bay in which she parked was reserved for taxis and that at the relevant time she had a valid parking ticket. According to her, she had a grace period of four days from the date of notice within which to pay the fixed penalty for parking in a reserved bay, assuming the bay was duly indicating its reserved status in order to inform motorists that they cannot park in it. She submitted that the notice given to her did not comply with the enabling provisions of the parent act as it did not give the grace period within which to pay the fixed penalty, the penalty fee which is the only amount payable during the grace period, and the date of expiry of the period during which no criminal proceedings for the offense may be instituted and after which no payment pursuant to the notice shall be permitted. She pointed out that there was non-compliance with mandatory provisions rendering the actions of the first respondent illegal and therefore unnecessarily putting her out of pocket by making this application. She further pointed out that sometime in March 2020 a similar application was finalised by the Supreme Court wherein the Supreme Court found that there was spoliation. She prayed for the grant of spoliation with costs on a higher scale.

The application was opposed by the first respondent. Phakamile Mabhena Moyo (Moyo), the Acting Town Clerk deposed to the opposing affidavit. He pointed out that the clamping, towing away and storage of the motor vehicle was done in terms of section 4 of the Harare (Clamping and Tow-Away) By-Laws 2005, SI 104 of 2005 as amended in 2019. Further that the ticket issued to the applicant clearly stated that the offence is within the first schedule of the 1983 by-laws, i.e. section 4(g), and first respondent was authorised to tow away the vehicle. He submitted that the statutory instrument relied upon is in force and has not been struck down. Moyo further submitted that the applicant parked in the wrong bay, whether or not there were indication signs creates a dispute of fact which would have been resolved if applicant had taken proper pictures of the area. He pointed out that in any event the only issue in this application is whether or not the first respondent took the law into its own hands, which it did not.

Moyo pointed out that applicant approached the court for spoliation but now wants to engage in a dispute about the validity of the by-laws. Further that by alleging that the by-laws are *ultra vires* the parent act, applicant is acknowledging that first respondent's officers acted

within the confines of the law but she is not happy with the law. Moyo also pointed out that the vehicle of the applicant in the Supreme Court case referred to by applicant was clamped and towed away for an offence that was not covered in the first schedule of the 1983 by-laws and the case was heard before the 2019 amendment came into effect. He prayed for the dismissal of the application with costs on a higher scale.

In oral submissions Mr *Mutema* urged the court to take heed of the fact that the Supreme Court had overturned a reasoned judgment of this court in a similar matter. He submitted that a notice containing the 4 days grace period should precede the clamping and towing away and since the towing was done before 4 days had expired, it was unlawful. On the other hand, Mr *Nkomo* submitted that the towing away was done in terms of an extant law and the court cannot interdict acts authorised by statute. Ms *Moyo* submitted that the by-laws in question should be read with the Urban Councils Act [*Chapter29:15*]. She pointed out that the offence involved in the Supreme Court case is not the same as *in casu*.

THE LAW

It is trite that in order to obtain a spoliation order two requirements must be satisfied. In the case of *Mswelangubo Farm (Private) Limited & 2 Ors* v *Kershelmar Farms (Private) Limited & 3 Ors* SC 80/22 reference is made to the case of *Botha and Anor* v *Barret* 1966 (2) ZLR 73(S) in which GUBBAY CJ (as he then was) at p79 D-E stated that:

> "It is clear law that in order to obtain a spoliation order two allegations must be made and protected. These are:
>
> 1. That the applicant was in peaceful and undisturbed possession of land;
> 2. That the respondent deprived him of the possession forcibly or wrongfully against his consent."

The requirements for spoliatory relief were also discussed in *Streamsleigh Investments (Pvt) Ltd* v *Autoband (Pvt) Ltd* SC 43/14. Therein the court held as follows:

> "It has been stated in numerous authorities that before an order for *mandamus van spolie* may be issued an applicant must establish that he was in peaceful and undisturbed possession and was deprived illicitly. See also *Nino Bonino* v *De Lange* 1906 TS. 120 at page 122 where the court in outlining the scope of the *mandamus van spolie* stated as follows:
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> > 'It is a fundamental principle that no man is allowed to take the law into his own hands. No one is permitted to depose another forcibly or wrongfully against his consent

> of 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 enquiry or investigation into the merits of the dispute.'"

See also *Kama Construction (Private) Limited* v *Cold Comfort Farm Cooperative & Ors* 1999 (2) ZLR 19 (S), and *Banga & Anor* v *Zawe & 2 0rs* SC 54/14.

Where an applicant has laid the basis for spoliatory relief, the respondent has two defences available to him. Firstly he must prove that the applicant was not in peaceful and undisturbed possession of the thing in question at the time of dispossession, and, secondly, that the dispossession was lawful and did not constitute spoliation.

APPLYING THE LAW TO THE FACTS

It was common cause that the first requirement was not in contention. The Parties were agreed that applicant was in peaceful and undisturbed possession of the motor vehicle at the relevant time. The sole issue for consideration was whether or not the deprivation of possession was done lawfully. First respondent argued that the dispossession was done lawfully. It was not disputed that the dispossession was done in accordance with the Harare (Clamping and Tow-Away) By-Laws Statutory Instrument 104 of 2005 as amended. The argument presented for the Applicant was that the by-laws are *ultra vires* the enabling Act, that is, the Municipal Traffic Laws Enforcement Act [*Chapter 29:10*]. A look at the order sought shows that the propriety or otherwise of the by-laws was not an issue for consideration in this case. The order sought was couched in the following terms:-

> " IT IS ORDERED THAT
> 1. Application for spoliation be and is hereby granted.
> 2. The 1st Respondent be and is hereby ordered to release to the Applicant her vehicle without any fine and/or storage charges being payable to it.
> 3. The 1st Respondent be and is hereby ordered to pay cost of suite on Attorney Client Scale."

Applicant questions the justification of the actions of the first respondent's officer in circumstances where she alleges that there was no indication by either road sign or designated marking that the bay in which she parked was reserved for taxis. Whether or not applicant had parked at a designated and marked bay is not the issue to be decided in this case. First respondent's officer formed an opinion that applicant had committed an offence and the question is whether or not his actions are sanctioned by any law. Section 4 of SI 104 of 2005 allows an authorised person who has reason to believe that a violation of the Harare Municipal By-Laws

specified in the First Schedule has been committed to immobilise the offending motor vehicle and tow it away to a secured compound. I am of the view that the submissions for the applicant had a concession that the vehicle was towed away in terms of the applicable by-laws. As stated above, the argument was that the by-laws are *ultra vires* the enabling Act and are therefore invalid. As submitted for first respondent, the by-laws are extant and cannot be ignored.

I was not persuaded to follow the decision of the Supreme Court in the case of *Melody Muza* v *Harare Municipality* (Traffic Enforcement Section) SC 142/20. This was an appeal from judgment HH 211/20. The offence in that matter was failing to display a parking disc during the duration of the said parking. *In casu,* the offence is parking at a place designated for taxis only. I was unable to conclude that the present matter is on all fours with the matter dealt with in the Supreme Court, especially considering that different offences are involved. The Supreme Court decision is not accompanied by reasons thereof. In addition, counsel for applicant did not dispute the submission for the first respondent that the Supreme Court case involved an offence that was not covered in the first schedule of the 1983 by-laws and was committed before the by-laws were amended. This was in contrast with the current matter which involves an offence that was covered by the 1983 by-laws and was committed after the by-laws were amended. As a result I was inclined to decide the matter on the basis of whether or not the second requirement for spoliation was met. Did the first respondent take the law into its own hands? The facts show that the answer should be in the negative. I found that applicant was dispossessed of the motor vehicle in accordance with the law.

For the above reasons, the application was dismissed.

Stansilous and Assocciates Law Firm, applicant's legal practitioners
Gambe Law Group, first respondent's legal practitioners