TICHAONA REVESAI
versus
WINDMILL (PVT) LTD

HIGH COURT OF ZIMBABWE
MATANDA-MOYO J
HARARE, 21 November 2016 and 14 December 2016

Opposed Matter

Ms R Zigomo, for the applicant
R Magundani, for the respondent

MATANDA-MOYO J: The applicant on 29 July 2014 filed an application for spoliation.

The brief facts are that the applicant was employed by the respondent as its Division Manager (stock feeds) whilst so employed he applied and got a personal motor vehicle loan. He bought a Nissan Navara Titanium registration number ADF 5843. Such motor vehicle is registered in his name. On 7 June 2014 the applicant tendered his resignation to the respondent with effect 1 July 2014. On 17 June 2014 Control Department seized the keys of the motor vehicle from the applicant thereby unlawfully dispossessing the applicant of his motor vehicle. The applicant had had undisturbed possession of his motor vehicle for five months. On 17 June 2014, the applicant was unlawfully dispossessed of his vehicle. On 20 June 2014 the applicant wrote an e-mail to the respondent where he said;

> "… in addition to the humiliation I suffered at the hands of the loss control staff when they forced me out of the office and forcibly took my car ….. I will only have any discussions with you on e-mail subject to your organisation first paying me my terminal benefits ….. and the money I had paid for the car (6 months loan repayment + 2 000 deposit for top up) that was grabbed from me since I no longer want the car and you can take it …"

The applicant now seeks that the motor vehicle be restored to him within 24 hours of this order failure of which the Deputy Sheriff be ordered to seize and surrender the vehicle to applicant.

The applicant submitted that he has made out a case for spoliation and is entitled to the order sought.

The respondent opposed the granting of the order sought on the following grounds;

1) That the motor vehicle was repossessed with the applicant's consent. The respondent based its argument on the e-mail written to it particularly where the applicant demanded refund of instalments paid towards the vehicle and specifically stated that he was no longer interested in the vehicle.
2) That the motor vehicle was pledged as security and that the respondent was entitled to repossess the vehicle as per clause 3 of the agreement.
3) That the remedy of spoliation is no longer available to the applicant, it being an urgent and temporary relief. The applicant took over a month to file this application. The respondent urged this court to dismiss the application with costs on a higher scale.

The applicant submitted that the remedy of spoliation is available where a person has been deprived unlawfully of his possession of movable or immovable property. For this proposition I was referred to the case of *Naidoo* v *Moodley* 1982 SA 4184 (T). The applicant submitted that for an applicant to be successful in his claim, all he needs to prove was that:

i) He was in peaceful and undisturbed possession of the property in question at the time and
ii) That he was unlawfully deprived of such possession.

The applicant argued that the facts of this matter show that the applicant was in peaceful and undisturbed possession of his motor vehicle which was unlawfully taken away from him. It is common cause the respondent resorted to self-help and the applicant is entitled to the remedy sought.

The respondent whilst agreeing to the legal principles involving spoliation argued that spoliation process by its very nature is an urgent relief. The applicant by failing to bring this applicant urgently acquiesced to the dispossession. The question which arises for determination is whether a delay of over one month in bringing the present application amounts to a waiver on the part of the applicant of his rights to claim an order of spoliation. In *Jivan* v *National Housing Commission* 1977 (3) SA 890 (W) at p 893 A-D the court said:

> "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. In exercising this discretion I think the bar composed after one year in respect of the *mandament* consequential upon complaint is a guide to modern practice. If an applicant delayed for more than one year before bringing his application for a *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 consequence, that on this ground alone relief should be refused to the applicant." See also *DeViliers* v *Holloway* (1902) 12 CTR 566.

I do not believe applicant's delay herein can be classified as gross, seeing its only a delay of a month. However, the applicant wrote an e-mail to the respondent complaining about the manner of dispossession. In the same e-mail he claimed refund of the instalments he had paid to that day for the vehicle and indicated that he no longer required the vehicle. The delay in bringing the application should be construed together with the e-mail. Does the delay coupled with the e-mail display a state of mind in which the applicant acquiescence in the alleged disturbance of his possession. If so then such applicant would not be entitled to a *mandament* of *spolie*. The applicant in his e-mail indeed indicated that he was no longer interested in the vehicle. He was fully aware, as stated in his e-mail that such vehicle had been forcibly taken away from him. He did not say he was unable to find legal representation. He even claimed the amount he had paid towards the purchase of the vehicle. All the above facts show that the applicant did not intend then to regain possession of his vehicle, he had been unlawfully dispossessed of. The applicant made up his mind to abide with the respondent's actions in dispossessing him. The applicant's words in the e-mail to the respondent quoted (*supra*) amount to a waiver of his right to a spoliatory relief. I am satisfied that the respondent has managed to discharge the onus on it to show that the applicant waived his rights to a spolaitory relief. See *Laws* v *Rutherford* 1924 AD 261, *Hepner* v *Roodepoort-Maraisburg* Town Council 1962 (4) SA 771 A where STEYN CJ said:

> "There is authority for the view that in the case of waiver by conduct, the conduct must leave no reasonable doubt as to the intention of surrendering the right in question."

I am satisfied that the applicant with full knowledge of his rights, decided to abandon them expressly through the above e-mail. The words in such e-mail are clear. He wrote: "I no longer want the car." He even went further to claim a refund.

Whilst I am certain that on 17 June 2014 the applicant was unlawfully disposessed of his car without his consent, subsequently on 20 June 2014 he abandoned his rights to seek the relief of *mandament spolie* by legitimizing the unlawful dispossession. He thereafter consented to the dispossession and instead opted for refund of his contributions.

The applicant having abandoned his rights to seek the relief of spoliation cannot be allowed to do so at this late hour.

Accordingly the application is dismissed with costs.

Zigomo Legal Practice, applicant's legal practitioners
Scanlen & Holderness, respondent's legal practitioners