

M & W MOTORS (PVT) LTD  
and  
SYDNEY TENGANISO  
and  
SIMINYENI SIBINDI  
versus  
OWEN MUDHA NCUBE  
and  
TAPIWA MUGANHU  
and  
THE SHERIFF OF ZIMBABWE

HIGH COURT OF ZIMBABWE  
CHITAPI J  
HARARE, 4 December, 2015 and 2 August 2017

### **Opposed application**

*L Rufu*, for the applicant  
*A Madzimu*, for the 1<sup>st</sup> respondent

CHITAPI J: I reserved judgment in this application on 4 December, 2015. Owing to my redeployment to the Criminal Division in January, 2016 where I am still deployed, I could not timeously deliver my judgment because of the volume of work obtaining in the criminal division. I do acknowledge the follow up letters which have been written by the applicants' legal practitioners following up on the judgment. The delay is regretted. I however note that there has not been any undue prejudice occasioned to the applicant because the rights he seeks to assert and protect are in fact protected by a provisional order granted by this court. The application before me is for the confirmation or discharge of the provisional order currently in force.

The background to the application is that on 19 May, 2015, the applicants applied on an urgent basis for a provisional order in the following terms herein following against the first and second respondents. The third respondent was cited in his official capacity for purposes of enforcement of the provisional order in the event that it was granted. The urgent application was presided over by MUSAKWA J who issued a provisional order by consent of

the parties who were legally represented. The provisional order granted as aforesaid was in the following terms.

“TERMS OF FINAL ORDER SOUGHT

That the respondents show cause to this Honourable Court why a final order should not be made in the following terms:-

1. The 1<sup>st</sup> and 2<sup>nd</sup> respondents and all those who claim their right of occupation through them on stand no. 1244/1209 no. 1 Harare Road Kwekwe be and are hereby interdicted from interfering with applicants’ occupation from stand no. 1244.12089, no.1 Harare Road, Kwekwe.
2. The 1<sup>st</sup> and 2<sup>nd</sup> respondents and all those who claim their right of occupation through them on stand no. 1244/1209, no. 1 Harare Road, Kwekwe be and are hereby interdicted from evicting the applicants from stand no. 1 Harare Road, Kwekwe.
3. The 1<sup>st</sup> and 2<sup>nd</sup> respondents shall jointly and severally one paying the other to be absolved pay the applicants costs of this application on a client and attorney scale.

INTERIM RELIEF GRANTED

That pending the determination of the matter, the applicants are granted the following interim relief:-

1. 1<sup>st</sup> and 2<sup>nd</sup> respondents be and are hereby ordered and directed to forthwith restore possession and occupation of stand no. 1244/1209 no. 1 Harare Road, Kwekwe to the applicants.
2. Should the 1<sup>st</sup> and 2<sup>nd</sup> respondents fail to comply with paragraph 1 above, 3<sup>rd</sup> respondent or his lawful deputy are hereby ordered to restore possession and occupation of the said stand no. 1244.1209, no. 1 Harare Road Kwekwe to the applicants.
3. 1<sup>st</sup> respondent pays costs of this application on an attorney and client scale.

SERVICE OF PROVISIONAL ORDER

That leave be and is hereby granted to the applicants allowing, authorizing and permitting applicants’ legal practitioners to effect service of this provisional order on two (2) respondents herein.”

I should indicate that at the hearing before MUSAKWA J, the second respondent was in default. The provisional order as against the second respondent was therefore issued in default. Note must however be made that despite the second respondent’s default MUSAKWA J ordered that the provisional order be served upon him. The applicants’ legal practitioners were further granted leave to serve the provisional order on both the first and second respondents.

The provisional order was duly served upon the first and second respondents. The second respondent did not file any opposing papers. He however was served with the order on 26 May, 2015. Service was effected upon him by the Assistant Sheriff who served a copy

of the order upon a Mr Moyo, a responsible person at the second respondent's place of employment, C14 Zimra Building Kwekwe. Since the second respondent was properly served but did not file any opposing papers, he became barred. The second respondent must be deemed to have decided not to defend the application.

The first respondent was served with the provisional order on 2 June, 2015 when the applicants' legal practitioners served the order upon the first respondent's legal practitioners. A certificate of service to this effect was filed of record in terms of the rules of court.

The first respondent filed a notice of opposition and an opposing affidavit on 28 May, 2015 even before he had been served with the provisional order. Nothing turns on this because the first respondent was already aware of the order as it had been granted by consent on 19 May, 2015. I do not intend to dwell at length on the opposing affidavit because he did not oppose the provisional order and neither has he opposed the confirmation of the provision order save for the prayer by the applicants for costs which are claimed against him on the punitive scale of attorney and client.

In order that this judgment informs the reader of what the dispute between the applicants and the first and second respondents is, I will briefly set out the background facts. They are fairly straightforward.

The first applicant is the registered owner of Stand 1244/1209. It holds the property under Deed of Transfer No 253/92. A copy of the Deed of Transfer was filed as an annexure to the first applicant's founding affidavit. The first applicant is a registered company. The second and third applicants resided on the property. The first applicant averred that it has been leasing the property to the second and third applicants since January, 2012. The second respondent not being a lessee of the first applicant occupied the property without the blessing of the first applicant, hence the first applicant's prayer for the eviction of the second respondent. The second respondent was said to be an employee of the first respondent. The first respondent is a member of parliament for Nkayi constituency.

The first applicant's managing director in his affidavit deposed that he was served with a letter on 21 February, 2015, by the first respondent's legal practitioners. The letter was however addressed to one Mandi Masasa. A copy of the letter was annexed to the first applicant's founding affidavit. Apparently there is a mine called Isar Mine on the property in dispute herein. The first respondent's legal practitioners stated in the said letter that their client, the first respondent, was now the owner of the mine and demanded that the addressee should vacate the house at the mine by 31 March, 2015. Although the first applicant's

managing director was not the addressee, he engaged the first respondent's legal practitioners on the letter and produced proof of the first applicant's title to the property. It is of course common cause that title vested in and still vests in the first applicant. The first applicant's managing director thought that the issue had been resolved.

It was not until 5 May, 2015 that the second and third applicants telephoned the first applicant's managing director to report that some four persons said to be first respondent's aides had visited the leased property and threatened them with eviction. The quartet went on to unlawfully remove the second and third applicants' belongings from the property. The second respondent was said to be part of the quartet. A report to the police did not assist because police reportedly refused to render assistance on the basis that it was a civil dispute. If this is true, it is very unfortunate because there can be nothing civil about a person throwing out another person out of a home against the victim's consent. Such conduct on the person and property of another in forcibly removing property and ejecting them amounts to criminal conduct without doubt. I make this observation in passing.

The second respondent after forcibly evicting the second and third applicants took occupation of the main house and barred the said applicants from accessing it. Some of their belongings remained inside the house. It was this conduct by the second respondent and his gang which led the applicants to petition the court for urgent relief which MUSAKWA J granted in the form of the provisional order which the first respondent as already alluded to, did not oppose.

The first respondent in opposing the confirmation of the provisional order indicated that he did not engage in any of the conduct complained of by the applicants. He deposed in his opposing affidavit that he resolved the dispute of ownership of the mine and the property amicably with the first respondent after the first respondent produced the title deeds to the property. He denied that the second respondent was his aide nor that the second respondent and other unknown persons who perpetrated the acts of spoliation complained of by the applicants were acting for him nor under his authority. The first respondent averred that the applicants were out to tarnish his reputation and image as a well-known politician. In para 13.1 and 13.2 of his opposing affidavit, the applicant stated as follows.

“13.1 If surely the applicants were despoiled illegally as they allege, they should be allowed back into their respective houses. However, they should not cause me to incur legal charges when they can identify the perpetrators of the wrongful act.

13.2. The applicants have indicated that the second respondent is in occupation of the house. I cannot deny or verify those averments. However, if they are true and the manner of

despoliation is true, the second respondent should restore the status quo ante to the applicants.”

The first respondent further averred that there was no need to require him to restore possession of the property or be interdicted from interfering with the applicants because he had not committed any wrong. In the same vein the first respondent deposed that he had no problems with the court issuing the final order except with respect to a costs order being made against him. He stated that he had not and would not interfere with the applicants. In paragraph 15.2 of the opposing affidavit, the first respondent stated;

“15.2 In respect of the same costs, there is no basis for them to be claimed against me at whatever scale. I never despoiled anyone. There is nothing in the affidavit which detail my role in the alleged spoliation. There is therefore no reason for this court to grant any costs against me in the circumstances.”

The three applicants filed answering affidavits in which they insisted that the first respondent was known to the second respondent. They also averred that the second respondent was often seen in the company of the first respondent and would also be seen at the first respondent’s offices. They further averred that the second respondent was in the company of the first respondent’s driver called Danisa when he perpetrated the acts of spoliation. They set out other instances or facts tending to connect the first respondent with the second respondent. In their reasoning, they concluded that the second respondent was acting on the instruction of the first respondent. The first respondent was therefore on the reasoning of the applicants’ vicariously liable for the conduct of the second respondent.

In presenting argument, the applicants counsel submitted that she would abide by the papers filed of record. She however stated that the provisional order had been served upon the first respondent who accepted service on behalf of the second respondent. This was not true of course because as already alluded to, service was made on a Mr Moyo. The applicant’s counsel submitted that the acceptance of service was proof of a relationship between the first and second respondents.

Counsel for the first respondent also sought to abide by the papers filed of record. He persisted in his submission that there was no evidence to support the assertion that second respondent acted upon the instructions of the first respondent.

The issues falling for determination are firstly; whether the first respondent should be held liable for the act of spoliation perpetrated by the second respondent and three other persons who have not been cited in this application. If the first respondent is liable, the

second issue is whether the second respondent is liable for the applicants' costs and the scale of such costs.

It is trite that an applicant stands or falls on the founding affidavit see *Austerland (Pvt) Ltd v Trade Investments Bank & 2 Others* SC 92/05; *Magwiza v Ziumbe N.O* 2000 (2) ZLR 489 (S) 492 D-F. A founding affidavit is the document which grounds an applicants' case. It must therefore contain details of all the evidence which the applicant seeks to rely upon for relief. A cause of action cannot be made on answering affidavits after a respondent against whom a case has been brought has opposed the applicant. The founding affidavits of the applicants in this applicant lack detail as to the basis of apportioning liability to the first respondent. I have carefully perused the founding affidavit of the first applicants managing director and the supporting affidavits of the second and third applicants. The culpable conduct of the first respondent is not detailed as regards the commission of the acts of spoliation. The first respondent did not take part in the spoliation. His connection with the second respondent was not pleaded. It was incumbent upon the applicants in their founding affidavits to set out the basis for extending liability to the first respondent who was not at the scene of the commission of the spoliation. The applicant cannot fill in the yawning gap or lacuna in its case by founding a basis or cause of action in subsequent affidavits which answer the first respondent's denial.

I am for argument purposes and as an aside prepared to accept that the rule that an applicant falls or stands on the founding affidavit is not absolute or a rule of thumb. New material may in the discretion of the court be permitted to be raised in a replying or answering affidavit. However this discretion should be exercised in applicant's favour in exceptional circumstances in the interest of justice. This court has inherent power in terms of s 176 of the Constitution to regulate its process. The rule requiring that an applicant's case be only founded or made up on the founding affidavit is a rule of practice. The court should not in the dispensation of justice be inflexible. It should exercise its discretion judiciously in allowing or disallowing new material to be raised in the answering affidavit. The new material should not prejudice the respondent in his or her defence. For example where an applicant seeks to explain out or add more flesh to an allegation made in the founding affidavit, a court should allow this. The opposing affidavit may also have raised an issue which the applicant could not have reasonably anticipated or known at the time of preparing the founding affidavit. It must however be emphasised the fact that the court has a discretion

should not be construed as giving a licence to applicants to depart from the general rule that they make out their cases in the founding affidavit.

See *Nedbank Ltd v Hoare* 1988 (4) SA 541 E; *Shaftesbury Sectional Title Scheme v Rippert Estate & Others* 2003 (5) SA 1 (c).

In *casu* however, I am not prepared to exercise the court's discretion in favour of the applicants because when they prepared their founding affidavits they were aware of the relationship between the first and second respondents. They were also aware that the first respondent was not present on the property when the spoliation acts were committed. They should therefore have set out the facts on which they relied upon to apportion liability to the first respondent when they instituted the urgent application. The failure by the applicants to properly plead a case against the first respondent when such information was available to them typifies an example where the general rule must apply that their case stands or falls on the founding affidavit.

Following on the above, I am in agreement with the first respondent that no evidence sufficient to apportion liability against him on a balance of probabilities was presented by the applicant. I refuse to find such evidence in the answering affidavits. In any event having read through them, I would had I taken them into consideration still have found that the applicants did not prove that the perpetrators of the spoliation were acting on behalf of the first respondent.

I do not consider it necessary therefore to interrogate the question of costs against the first respondent nor the scale thereof in view of my findings as above. The first respondent has consented to the final order being issued for as long as he is not saddled with costs. He has also not sought for costs. The first respondent in consenting to the final order stated that it will not affect him because he did not and is not minded to despoil the applicants.

I therefore make the following order:

1. The 1<sup>st</sup> and 2<sup>nd</sup> respondents and all those who claim their right of occupation through them on stand no. 1244/1209 no. 1 Harare Road Kwekwe be and are hereby interdicted from interfering with applicants' occupation from stand no. 1244.12089, no.1 Harare Road, Kwekwe.
2. The 1<sup>st</sup> and 2<sup>nd</sup> respondents and all those who claim their right of occupation through them on stand no. 1244/1209, no. 1 Harare Road, Kwekwe be and are

hereby interdicted from evicting the applicants from stand no. 1 Harare Road, Kwekwe.

3. The second respondent shall pay the applicants' costs on the attorney and client scale.

*Dzimba Jaravaza & Associates*, applicants' legal practitioners  
*Mahuni & Matutu*, respondents' legal practitioners