KENNETH MUCHAKATISO
versus
INNOCENT PFIDZAI MANWERE

HIGH COURT OF ZIMBABWE
TAKUVA & MUSITHU JJ
HARARE, 19 October 2023 and 20 March 2025

Civil Appeal

Mr Z T Zvobgo, for the appellant
Mr T Matiyashe, for the respondent

MUSITHU J: This is an appeal against the whole judgment of the Magistrates Court handed down at the Kadoma Magistrates Court on 28 March 2023.

The Factual Background

On 6 March 2023, the respondent as the applicant in the court *a quo*, approached the court with an *ex parte* application for a spoliation order against the appellant as the respondent. The court *a quo* granted the following order pursuant to that application:

> "Wherefore after reading documents filed of record, a *rule nisi* be and is hereby issued, calling upon the Respondent on the 31 day of March 2023, to show cause, if any, why,
> 1. Applicant should not be restored his permanent, peaceful and undisturbed possession of house number 6216 (A) Westbrook, Kadoma.
> 2. Respondent should not be ordered to pay costs at a higher scale.
>
> **INTERIM RELIEF GRANTED**
>
> 3. That pending the determination or finalisation of this matter, Respondent is ordered to restore Applicant his peaceful and undisturbed possession of house number 6216(A) Westbrook, Kadoma upon sight of this order, failure of which the messenger of court Kadoma be and is hereby ordered to restore Applicant his peaceful and undisturbed possession of house number 6216 (A) Westbrook, Kadoma."

The respondent's case, as set out in his founding affidavit in the court a *quo* was that on 10 March 2015, he entered into a Deed of Cession with the appellant wherein he purchased house number 6216 (a) Westbrook, Kadoma (the property) from the appellant. The respondent claimed that the appellant's wife, Kudzai Mafunganzira consented to the Deed of Cession. The appellant is alleged to have proceeded to the Kadoma Municipality and transferred title in the property to the respondent. The respondent therefore claimed to be the legal owner of the property.

According to the respondent, the appellant requested that he be allowed to continue staying in the property until such time that he would have arranged alternative accommodation. The appellant and his wife stayed at the property until 27 February 2023, being the date the respondent had asked them to vacate the property as he wanted to occupy it. The appellant borrowed some money from the respondent as he wanted to pay rentals at the property that he was moving into. The respondent advanced an amount of US$600.00, which he handed over to the appellant's wife. The appellant's wife acknowledged receiving the money in writing on 27 February 2023. The appellant and his wife moved out of the property, paving the way for the respondent to take occupation.

The respondent claimed that on an undisclosed date in March 2023, he was surprised when a violent appellant returned to the property and forcibly took occupation alleging that he still had rights in the property. The appellant's conduct triggered the *ex parte* application for the spoliation order. The respondent claimed that he was in peaceful and undisturbed possession of the property and the appellant forcibly took occupation without his consent. It was on that basis that the court was requested to restore the status *quo ante*.

The Appellant's Response to the *Ex Parte* Application

After being served with the order granted on an *ex parte* basis in favour of the respondent and by way of response, the appellant filed a court application for the discharge of the order granted *ex parte* in terms of o 22 r 7 (4) of the Magistrates Court (Civil), Rules, 2019 (the Rules). The application was conjoined with an application for a *declaratur* and consequential relief in terms of s 14(1)(g) of the Magistrates Court Act[1] (the Act). In the composite application, the appellant sought the following relief:

"1. The order granted *ex parte* on 6th March 2023 in the matter instituted under Kadoma Civil Magistrates Court case number CGK 101/23 be and is hereby discharged.
2. It be and is hereby declared that the Respondent's rights, interests and obligations arising from the Deed of Cession entered into by and between the Applicant and Respondent on or about 10th March 2015, in respect of the immovable property known as Stand Number 6216(A) Westbroke Park, Kadoma, have become permanently extinguished by reason of extinctive prescription.
3. Consequently, it be and is hereby ordered that the Respondent and all those claiming occupation through him shall forthwith vacate the immovable property known as Stand Number 6216 (A) Westbrooke Park, Kadoma.
4. Failing compliance with the provisions of paragraph 3 above, the Messenger of Court Kadoma be and is hereby ordered, directed and authorised to forcibly remove the

[1] [*Chapter 7:10*]

Respondent, and all those claiming occupation through him, from the immovable property known as Stand Number 6216 (A) Westbrooke Park, Kadoma.

5. The Respondent shall pay the Applicant's costs of suit on the legal practitioner and client scale."

In motivating his claims, the appellant submitted that he purchased the property from KN Properties Land Developers on 7 August 2014. He proceeded to build a house at the property and finished construction in 2018. Since then, he had been in occupation of the property with his family. The appellant claimed that around 10 March 2015, he and the respondent signed a Deed of Cession, which provided in clause 1 thereof that it was subject to the condition precedent that the City of Kadoma must give its written consent to the Cession Agreement. Without that consent, the Deed of Cession would not take any effect. No such consent was given by the City of Kadoma.

The Deed of Cession was a contractual agreement, which meant that all rights accruing to the parties therefrom were subject to the prescription period of three years. The appellant contended that since the Deed of Cession was signed on 10 March 2015, the respondent ought to have enforced his rights under that agreement on or before 10 March 2018. The condition precedent of obtaining the consent of the City of Kadoma had not been fulfilled within the mandatory prescription period. The appellant also averred that since he completed construction of the house and took occupation in 2018, the respondent ought to have sought his eviction before the end of 2021. His right to seek the appellant's eviction had also prescribed.

The appellant also averred that the document titled MANIFESTATION OF MUTUAL CONSENT that his wife was made to sign by the respondent on 27 February 2023, upon receipt of the sum of US$600,00 also confirmed that the appellant was in occupation of the property all along.

The appellant submitted that the spoliation order obtained *ex parte* had to be discharged for the following reasons. Firstly, the application was improperly before the court. The court had no jurisdiction to grant a spoliation order on an *ex parte* basis. Order 22 r 7(1) spelt out those instances where an *ex parte* application could be made, and a spoliation order was not one of them. Secondly, the *ex parte* application was devoid of merit because the respondent was never in peaceful and undisturbed possession of the property. Thirdly, the respondent never acquired a right of occupation of the property. The rights emanating from the Deed of Cession

had prescribed. The City of Kadoma had not given its consent as required by the Deed of Cession.

The relief of a *declaratur* and consequential relief was motivated on the basis that the respondent never acquired any rights in the property because his claim had prescribed. The City of Kadoma had not given its consent to the arrangement meaning that any rights arising from the Deed of Cession had become obsolete.

The appellant's application was opposed by the respondent. The opposing affidavit raised the following preliminary points. The first was the appellant had used the wrong procedure. Instead of proceeding in terms of o 22 r 7(4), which applied to any person who was not part of the proceedings, the appellant ought to have proceeded in terms of o 23 r 3(3). In terms of that provision the return day of an order made *ex parte* could be anticipated by a respondent upon giving 24 hours notice to the applicant. To that end, the appellant ought to have filed his opposition to the spoliation and proceeded to anticipate the return date by giving the respondent 24 hours notice.

The second point was that the court lacked jurisdiction. This was because if the claim had prescribed as contended by the appellant, then there was no agreement to talk about. The monetary jurisdiction of the court was RTGS 3 million dollars, and the respondent had bought the property for US$124, 000.00 which was way above the jurisdiction of the court. Thirdly, it was averred that there were material disputes of fact incapable of resolution on the papers. The appellant was no longer the owner of the house as it was now registered in the name of the respondent. The Municipality of Kadoma had given its consent to the agreement between the parties. The rest of the averments were similar to those made in motivating the *ex parte* application for the spoliation order.

The ruling of the court *a quo*

On the first preliminary point concerning the use of a wrong procedure, the court determined that the appellant and his pleadings were properly before the court. The court reckoned that the use of the words *"any person"* in o 22 r 7(4) was so broad as to encompass a person in the position of the appellant, while o 23 r 3(3) was only restricted to a respondent cited in the pleadings. As regards the issue of jurisdiction, the court determined that it had the requisite jurisdiction to entertain an *ex parte* application for a spoliation order in terms of order

23 r1(1). The court further determined that it also had jurisdiction to grant a *declaratur* because the appellant also sought a consequential relief over and above his prayer for a *declaratur*. The court did not deal with the argument concerning the absence of jurisdiction as it related to the value of the property.

On the question of prescription, the court determined that the dispute before it was one of spoliation. The court was concerned with the restoration of the status *quo ante* without the need to delve into the parties' rights or claims. This preliminary point was also dismissed. As regards the claim for the *rei vindicatio* made by the appellant, the court dismissed it on the basis that such claim was concerned with ownership rights, an issue that did not arise in spoliation proceedings. The court was not enjoined to consider the parties ownership rights at this stage.

On the merits, the court determined that respondent had taken possession of the property on 27 February 2023. The Messenger of Court had removed the appellant from the property on 6 March 2023 following the granting of the *ex parte* application. From 27 February 2023 to 6 March 2023, there was no court order that had restored the appellant's possession of the property. The respondent's consent was required if the appellant was to repossess the property after having relinquished it to the respondent. It was on that basis that the court was satisfied that the respondent was unlawfully dispossessed, and possession of the property should be restored to him. The court proceeded to confirm the *rule nisi* that it granted on 6 March 2023 with costs.

Proceedings before this court

Agrieved by the decision of the court *a quo*, the appellant approached this court on appeal on the following grounds:

"1. The court *a quo* erred on a question of law when it found that the respondent had proven on a balance of probabilities the requirements for confirmation of an *ex parte* spoliation order in circumstances where the Respondent had never been in peaceful and undisturbed possession of the immovable property that was the subject of the application that was before the court.

2. The court *a quo* erred on a question of law when it confirmed the *rule nisi*, in circumstances where it had been demonstrated that the deed of cession upon which the respondent relied as the basis for taking occupation of the said immovable property had not become operational by reason of the non-fulfilment of the condition precedent set out in the agreement, and in circumstances where the respondent's rights arising from the deed of cession had been extinguished by reason of extinctive prescription.

3. The court *a quo* grossly misdirected itself on the facts by totally failing to take into account evidence which corroborated the allegation that the respondent had never at any point in time taken possession of the said immovable property, and as such, could not have been seized with peaceful and undisturbed possession of the immovable property, so much so that no right minded person, seized with similar facts, would have arrived at the same determination as that arrived by the court *a quo*.

4. The court *a quo* misdirected itself by failing to find that an order for punitive costs against the respondent was warranted on account of his abuse of court process, so much so that no right-minded person, seized with similar facts, would have arrived at the same determination as that arrived at by the court *a quo*."

Based on the above grounds of appeal, the appellant urged the court to allow the appeal with costs and set aside the decision of the court *a quo* and substitute it with one discharging the order granted *ex parte*, with a concomitant order of costs on the legal practitioner and client scale.

Submissions on the grounds of appeal and the analysis

Upon a perusal of the grounds of appeal, it was our considered view that grounds of appeal one and three were essentially similar since they were concerned with the same issue, which was whether the respondent had managed to prove that he was despoiled by the appellant. This observation was also shared by both counsels. The grounds of appeal therefore proffered three issues for determination by this court and these are:

- Whether the respondent proved spoliation on a balance of probabilities.
- Whether the court *a quo* erred in failing to consider that the condition precedent to the consummation of the Deed of Cession had not been fulfilled and whether the respondent's claim had prescribed.
- Whether the court *a quo* erred in not failing penalise the respondent with an order of costs on the punitive scale.

Before we delve into the issues that are the subject of the appeal, it is necessary to dispose of an important procedural matter that has a significant bearing on this appeal. This concerns the propriety of the procedure adopted by the appellant herein in response to the *ex parte* application. In stead of filing a notice of opposition to the *ex parte* application, the appellant filed what he called "NOTICE OF APPLICATION FOR DISCHARGE OF ORDER MADE EX PARTE IN TERMS OF ORDER 22, RULE 7(4) OF THE MAGISTRATES COURT (CIVIL) RULES, 2019, COUPLED WITH APPLICATION FOR DECLARATUR AND CONSEQUENTIAL RELIEF IN TERMS OF SECTION 14 (1)(g) OF THE MAGISTRATES COURT ACT [*CHAPTER 7:10*]"

As already noted, the respondent herein objected to the use of this procedure in the court *a quo* arguing that the appellant should have proceeded in terms of o 23 r 3(3), which permits a respondent to anticipate the return date of an order made *ex parte* upon 24 hours' notice to the applicant. The lower court dismissed the preliminary point raised by the respondent reasoning that nothing precluded the appellant from proceeding in terms of o 22 r 7(4), which was wider in scope to bring the appellant within its ambit.

At the commencement of the oral submissions, we invited counsel to address us on this point. Mr *Zvobgo* for the appellant argued that there was no need to file a notice of opposition to the *ex parte* application, once the appellant opted to proceed in terms of o 22 r 7(4). Mr *Matiyashe* for the respondent maintained his argument as in the court *a quo*, that o 22 r 7(4) was reserved for those cases where the person affected by an order made *ex parte* was not a party to the proceedings that gave birth to that order. For that reason, he insisted that the *ex parte* application was not opposed at all.

In disposing of this issue, it is necessary to relate to the provisions that have a bearing in an application of this nature in the court *a quo*. Order 22 r 7(4) of the Rules states as follows:

> "***7. When ex parte application procedure can be used and the procedure to be followed***
> (1) An ex parte application can only be made in the following instances—
> (*a*) an application for an interdict, where a child is about to be removed from the court's jurisdiction; or
> (*b*) for purposes of attachment to confirm jurisdiction; or
> (*c*) pursuant to section 33 ("Garnishee orders") of the Act; or
> (*d*) where the procedure is provided for under these rules or any other enactment.
> (2) An ex parte application shall be made in writing stating shortly—
> (3) Except where otherwise provided, an ex parte application shall be supported by an affidavit.
> (4) Any person affected by an order made ex parte, including an interdict for rent under section 38 of the Act, may apply to discharge it with costs on not less than twenty-four hours' notice.

Order 23 rule 1(1) and (2) of the Rules states as follows:

> **"ORDER 23**
> INTERDICTS AND ATTACHMENTS
> ***1. Method of application***
> (1) An application to the court for an order referred to in section 12 of the Act (an order for arrest *tam quam suspectus defuga*, an attachment, an interdict or a *mandamenten van spolie*) or for an order referred to in Order 22 rule 7(1)(a) and (b) may be made ex parte.
> (2) An *ex parte* application referred to in sub rule (1) shall be upon affidavit stating shortly the facts upon which the application is made and the nature of the order applied for."

Section 12 of the Act which is referred to in o 23 r 1(1) provides as follows:

> **"12 Arrests and interdicts**

(1) Subject to the limits of jurisdiction prescribed by this Act, the court may grant against persons and things orders for arrest *tamquam suspectus de fuga*, attachments, interdicts and *mandamenten van spolie*.
(2) ……."

From a reading of o 22 r 7(4), it is clear to us that an application for a *mandamenten van spolie* is not one of the applications that can be made *ex parte* under that provision. The provision is clear on those instances that an application can be made *ex parte* and the *mandamenten van spolie* is not one of them. An application for a *mandamenten van spolie* is clearly provided for in o 23 r 1(1) as read together with s 12 (1) of the Act. Although the respondent's *ex parte* application in the court *a quo*, did not reflect the label under which it was filed, it is clear to us that it was filed in terms of this o 23 r 1(1) as read with s 12 (1) of the Act. In her ruling on the point, the learned magistrate did remark that the court derived its jurisdiction to deal with *ex parte* applications for spoliation in terms of o 23 r 1(1).

Order 23 r 3 (3) which also falls under the broad heading of interdicts and attachments states as follows:

"23(3). Procedure where summons includes interdict; return day for ex parte orders
(1) Where a summons referred to in section 38 of the Act is to include an interdict in terms of that section a notice in the form prescribed in form No. CIV 8 shall be endorsed by the plaintiff on the summons.
(2) An order made *ex parte*, other than an order;
(*a*) referred to in section 38 of the Act;
(*b*) of attachment for rent under section 34 of the Act;
shall call upon the respondent to show cause against it at a time stated in the order, which shall not be a shorter time after service than the time allowed by these rules for appearance to a summons, unless the court gives leave for shorter notice.
(3) The return day of an order made *ex parte* may be anticipated by the respondent upon 24 hours' notice to the applicant."

From our reading of the above provision, an order made *ex parte*, other than an order referred to in o 23 r 3(2)(a) and (b), may be anticipated by a respondent upon 24 hours notice to the applicant. In our respectful view, applications for the *mandamenten van spolie* must therefore be dealt with in terms of order 23 which makes specific reference to the application procedure for that kind of relief. The submission that the *ex parte* application for the spoliation order could be dealt with in terms of o 22 r 7 (4) was therefore clearly erroneous. That provision is reserved for a different class of applications and the *mandamenten van spolie* is not one of them. The appellant should have anticipated the return day of the *ex parte* application in terms of o 23 which not only provides for the *mandamenten van spolie* but makes specific mention

of the return day which can be anticipated by the respondent on 24 hours' notice in terms of r 3 (3).

The appellant was the respondent referred to in o 23 r (3)(3). As a respondent in the *ex parte* application, the appellant could not anticipate the return day without filing his opposing papers to the application. Anticipating the return day on 24 hours notice simply meant that the appellant was entitled to request that the matter be heard sooner than the date provided as the return day of the *rule nisi*. The appellant's composite application for the discharge of the order made *ex parte* and the *declaratur* and consequential relief was ill-conceived and caused by misconstruction of o 22 r 7 (4). It created an absurd scenario whereby the respondent was then invited to file an opposing affidavit in response to a completely new application which introduced new issues that deviated from the order granted *ex parte*. The court effectively ended up dealing with two applications, with the *ex parte* application remaining unopposed.

The court *a quo* fell into error in treating the appellant's application as an application to anticipate the return day as well as a notice of opposition to the *ex parte* application. Our conclusion is that the *ex parte* application for the spoliation order was unopposed, and it ought to have been dealt with as such. As was observed by MCNALLY JA in *Fawcett Security Operations (Pvt) Ltd* v *Director of Customs and Excise and Ors*[2], the simple rule of the law is that what is not denied in an affidavit must be taken to have been admitted. The averments made in the respondent's founding affidavit to the application for spoliatory relief must be taken as having been uncontested. It follows that the present appeal was not properly before the court because the appellant did not oppose the relief that the respondent sought and was granted in the court *a quo*. The appeal was not only incurably defective, but it was also wrong and bad in law, and it stands to be dismissed.

COSTS OF SUIT

The respondent implored us to dismiss the appeal with costs on the higher scale. We are however mindful of the fact that the court *a quo* fell into error when it decided to treat the appellant's application as a notice of opposition and determined that the appellant was properly before the court. The court *a quo* could have given the parties proper directions which would

[2] 1993 (2) ZLR 121 (S) at 127F

have led to the filing of proper pleadings to avert this pitfall. In the exercise of our discretion, we find it befitting to order that each party bears its own costs of suit.

Resultantly, it is ordered that:

1. The appeal be and is hereby dismissed.
2. Each party shall bear its own costs of suit.

MUSITHU J……

TAKUVA J……..Agrees

Zvobgo Attorneys, legal practitioners for the appellant
Matiyashe Law Chambers, legal practitioners for the respondent