DISTRIBUTABLE (101)

(1) MOVEMENT FOR DEMOCRATIC CHANGE- ALLIANCE (2) CHARLTON HWENDE (3) GODFREY COTTON

v

(1) TENDAI MUCHEKAHANZU (2) FRIDAY MULEYA (3) DOUGLAS TOGARASEYI MWONZORA (4) MORGEN KOMICHI (5) MOVEMENT FOR DEMOCRATIC CHANGE- TSVANGIRAI (6) MINISTER OF HOME AFFAIRS AND CULTURAL HERITAGE (7) COMMISSIONER GENERAL OF POLICE (8) THE MINISTER OF DEFENCE AND WAR VETERANS

(1) WASHINGTON GAGA (2) CHANCELLOR NYAMANDE (3) KUDAKWASHE MATIBIRI (4) EDITH SANA MANYIKA

v

(1) COMMISSIONER GENERAL OF POLICE N. O. (2) COMMISSIONER ZIMBABWE DEFENCE FORCES (3) FRIDAY MULEYA (4) PAUL GOREKORE (5) TENDAI MUCHEKAHANZU

SUPREME COURT OF ZIMBABWE
BHUNU JA, CHIWESHE JA & CHATUKUTA JA
HARARE: 2 NOVEMBER 2021 & 31 OCTOBER 2022

E. Mubaiwa, for the appellants

L. Madhuku, for the first to sixth and third to fifth respondents

Miss *M. Mavhemwa*, for the eighth to ninth, first and second respondents

CHIWESHE JA: This is an appeal against the judgment of the High Court sitting at Harare given on 26 June 2020 wherein the court *a quo* dismissed

with costs on the higher scale two urgent chamber applications for spoliation orders brought by the appellants under case numbers HC 2811/20 and HC 2813/20 respectively.

THE FACTS

The appellants in both cases averred in the court *a quo* that as of 4 June 2020 they were in peaceful and undisturbed possession of the property called Stand 856 Salisbury Township of Salisbury Lands, measuring 892 square meters, also known as No. 44 Nelson Mandela Avenue Harare, otherwise known as Harvest House. It is also known as Morgan Richard Tsvangirai House. The building consists of six floors all of which were occupied by officials and employees of the first appellant in HC 2811/20, a political party.

On the night of 4 June 2020 the appellants were dispossessed of these premises by the respondents. It is alleged that the respondents used the coercive force of military men and police officers to gain occupation of the premises to forcibly eject the appellants. The appellants contend that their ejection was wrongful and constituted illegal dispossession. It was for this reason that the appellants approached the court *a quo* seeking spoliatory relief.

The respondents opposed the applications for the spoliation orders in both cases. The court *a quo* heard both applications together and issued one judgment dismissing both applications.

Dissatisfied with that outcome the appellants have noted this appeal against the decisions in both cases, HC 2811/20 and HC 2813/20.

GROUNDS OF APPEAL

1. The court *a quo* grossly erred in failing to grant the applications when the requirements of a spoliation order had been met.

2. Court *a quo* erred and misinterpreted (sic) itself in taking judicial notice that the MDC was in occupation of the property from about the time of its formation when in fact and in law the legalities of occupation were irrelevant to the spoliatory remedies that were being sought.

3. The court *a quo* so seriously misdirected itself on the facts which misdirection amounts to a mistake of law when it found that the MDC-T was one and the same thing as the MDC and that the headquarters of the MDC-T was Morgan Richard Tsvangirai House when there was no evidence to support that conclusion.

4. The court *a quo* seriously erred and misdirected itself in holding that the mere fact that the MDC-T stated that its headquarters were/are at Morgan Richard Tsvangirai House, No. 44 Nelson Mandela Avenue, Harare meant that the owners of the property had confirmed the right of occupation to the MDC-T which finding was contrary to the unequivocal position of the owners that it had granted the right of occupation to the MDC Alliance.

5. The court *a quo* also erred in holding that only juristic persons were in possession of the property when evidence before the court showed that natural persons occupying the property under First Applicant and in their own right were also in possession of the property and were unlawfully despoiled of by the respondents.

6. The court *a quo* also erred and misdirected itself in holding that the applicants had no locus to sue for spoliation when this was not even the respondents' case and when in any event they had such locus regard being had to the fact they were in occupation of the property. Further and in any event the applicants were interested parties in this matter.

7. The court *a quo* erred and misdirected itself in holding that sixth respondent in HC 2811/20 had a contract with the owners of the property when no such contract was exhibited before the court and when none existed and when the owners were clear that they had given possession to first applicant in HC 2811/20. The conclusion was contrary to the evidence.

8. The court *a quo* erred and misdirected itself in failing to find that members of the Police force and the Zimbabwe National Army aided the act of spoliation which conduct had effect of putting both institutions into disrepute and constituted a dereliction of their constitutional functions.

9. The court *a quo* erred and misdirected itself in dismissing the application in Case No. HC 2813/20 on the basis that The applicants in that case had refused or not disclosed their employer when such fact was irrelevant to the question whether they had been despoiled or not.

The appellants sought the following relief.

"1. That the instant appeal succeeds with costs.

2. That the part of the judgment of the court *a quo* dismissing the application in HC 2811/20 be set aside and be substituted with the following:

'The application in HC 2811/20 be and is hereby granted.'

3. That the part of the judgment of the court *a quo*, dismissing the application in HC 2813/20 be set aside and be substituted with the following:

'The application in HC 2813/20 be and is hereby granted.'"

THE ISSUE

The grounds of appeal only raise one issue, namely, whether the appellants were wrongfully dispossessed of the premises in question.

PRELIMINARY ISSUE

The respondents raised one valid point *in limine*, namely, that the notice of appeal does not state the exact relief sought as required by r 37 (1)(e)of the Supreme Court Rules, 2018. I agree with that observation.

The relief sought must be the order that the appellant would have been granted in the court *a quo* if its application had succeeded. Ordinarily such relief would have been granted in terms of the draft order as adopted or modified by the court *a quo*. That order represents the exact relief that is being sought in the Notice of Appeal. It is not sufficient to simply state as in this case that "The application be and is hereby granted." It is mandatory to spell out the exact or actual relief sought. In other words the exact relief sought means the operative part of the order that could have been granted in the court *a quo*.

Accordingly I conclude that for that reason the notice of appeal is defective and fatally so. It must be struck off the roll for failure to comply with the mandatory provisions of r 37 (1) (e) of the Supreme Court Rules, 2018. See *Christopher Sambaza v Al Shams Global BVI Limited* SC 3/18, *Ndlovu v Ndlovu and Anor* SC 133/02 and *Edward Mudyavanhu v Reggie Francis Saruchera* SC 75/17

COSTS

The general rule is that costs follow the cause. The respondents seek costs on a legal practitioner and client scale. It is trite that such costs on the higher scale will not be granted lightly. A party seeking such punitive costs must lay out in clear terms the justification for such an award. The grounds upon which a court may grant such costs are well laid out by the authors *Herbstein and Van Winsen* in their work "The Civil Practice of the High Court and the Supreme Court of South Africa" fifth edition, volume 2 at pp 971 and 972. The learned authors state as follows:

> "The grounds upon which the court may order a party to pay an opponent's attorney- and client costs include the following: that the party has been guilty of dishonesty or fraud or had vexatious, reckless and malicious or frivolous motives; or committed grave misconduct either in the transaction under inquiry or in the conduct of the case. The court's discretion to order the payment of attorney- and-client costs is not, however, restricted to cases of dishonest, improper or fraudulent conduct: it includes all cases in which special circumstances or considerations justify the granting of such an order. No exhaustive list exists."

See *Mudzimu v Chinhoyi Municipality* 1986 (3) SA 140 (ZH).

None of the above grounds or any other special circumstances have been canvassed by the respondent as a ground upon which costs on the higher scale could be awarded. That being the case I am not persuaded that such higher costs should be awarded. An order for costs on the party and party scale shall obtain.

DISPOSITION

In the result the following order is issued:

"The matter be and is hereby struck off the roll with costs on the ordinary scale."

BHUNU JA: I agree

CHATUKUTA JA: I agree

Mbidzo Muchadehama & Makoni, appellants' legal practitioners

Chatsanga & Partners, 1st - 5th respondents' legal practitioners

Lovemore Madhuku Lawyers, 6th respondent's legal practitioners

Civil Division of the Attorney General's Office, 2nd – 3rd and 7th - 9th respondents' legal practitioners