

**DUMISANI SIBANDA**  
**And**  
**C. GAUCHE (PVT) N.O.**

**Versus**

**CHIEF NDLOVU**  
**And**  
**ROY NDLOVU**  
**And**  
**DAVID MLAUZI**  
**And**  
**NKULULEKO NDLOVU**  
**And**  
**FLAROLE INVESTMENTS (PVT) LTD N.O.**  
**And**  
**THE MESSENGER OF COURT N.O.**

IN THE HIGH COURT OF ZIMBABWE  
MOYO J  
BULAWAYO 28 JUNE & 16 SEPTEMBER 2021

**Urgent Chamber Application**

*Advocate S. Siziba* for the applicants  
*K. Ngwenya* for the respondents

**MOYO J:** This is an urgent chamber application wherein the applicants seek an order for spoliation wherein it is alleged that they were despoiled by the respondents. In specific terms applicants seek an order restoring to them possession of 103 Robert Mugabe Way in Bulawayo. The facts of the matter are that the applicants were in occupation of the property being the subject matter of this dispute. Litigation was commenced in the Magistrates' Court for the eviction of the applicants by the 1<sup>st</sup> respondent. The applicants noted an appeal against the decision of the Magistrates' Court on the 28<sup>th</sup> of May 2021. The notice of appeal was served on the Messenger of Court on 4 June 2021 while the Messenger of Court was already executing the order for ejection without knowledge that there is an appeal already pending.

Applicants contend that since there was an appeal already pending the whole exercise to eject them was unlawful and therefore an act of spoliation.

Upon being served with the notice of appeal the Messenger of Court immediately stopped the execution and the return of service attached to applicants' papers show that the Messenger of Court was in the process of evicting the applicants' when they were served with the notice of appeal and the return of service further states that thereafter eviction was suspended.

Respondents contend that the messenger of Court abandoned the process of ejection when they had already removed applicants' property and left it on the pavement. They further

contend that the Messenger of Court had already given the keys to the respondents at the actual time. It would appear that the Messenger of Court had already executed the order before being served with the notice of appeal. He then left applicants' property on the pavement and applicants then collected their property.

Consequently, per the respondents' contention, there could not be spoliation where the Messenger of Court was executing a court order when they had not been made aware that there was an appeal pending. It appears that central to the dispute is the question whether or not in the circumstances of this case the respondents committed an act of spoliation? Or as respondents' contend, the applicants were evicted by the Messenger of Court and left outside the premises paving the way for the respondents to take over the premises? It would appear to me that an order of the court was indeed granted and a writ of ejection subsequently issued. The Messenger of Court set upon executing the order until when the applicants served them with the notice of appeal.

It would appear to me that the execution had already commenced prior to the service of the notice of appeal on the Messenger of Court. I would thus be inclined to agree with the respondents that where there was an innocent bid to execute the ejection order with no knowledge of the pending appeal there could be no spoliation in my view. Spoliation cannot occur simultaneously with the execution of a court order because spoliation in itself involves taking the law into one's hand. So where a court order is executed by a person mandated by the law to do so, I do not hold the view that that can be defined as spoliation. It is an irregular process of execution which should be challenged on some other basis as opposed to spoliation. For instance, I hold the view that after the Messenger of Court had removed applicant's assets through an eviction, the appropriate legal action would have been to seek an order that the Messenger of Court returns the property that was "erroneously" removed. Only after the return of the assets by the Messenger of Court back into the premises would applicants be entitled to a spoliation order in my view. Whereafter the return of the items by the Messenger of Court, respondents would have then taken the law into their own hands and "evicted" the applicants. From the facts of this application, applicants were duly evicted by the Messenger of Court who upon being served with a notice of appeal, just abandoned the process without restoring possession to the applicants. An order for spoliation would thus not suffice in such circumstances in my view.

I accordingly find that the facts of the case do not sustain an order for spoliation as defined in our law. It is for these reasons that I will not find in applicants' favour and as a result I order as follows:

The application is dismissed with costs.

*Mathonsi Ncube Law Chambers*, applicants' legal practitioners  
*T. J. Mabhikwa & Partners*, respondents' legal practitioners