

MONICA MUGOVA  
and  
EDWELL MUGOVA  
versus  
STANLEY MWASE  
and  
WONDEFUL SEDEYA  
and  
ROBERT MUSVOSVI

HIGH COURT OF ZIMBABWE  
MHURI J  
HARARE, 12 and 15 September 2022

### **Urgent Chamber Application**

Mr *H Mutasa*, for 1<sup>st</sup> and 2<sup>nd</sup> applicants  
1<sup>st</sup> respondent In Person  
2<sup>nd</sup> respondent In Person  
Mr *Chitere*, for 3<sup>rd</sup> respondent

**MHURI J:** this is an urgent chamber application for a spoliation order in which applicants are seeking the following relief:-

1. That respondents be ordered to restore applicants' possession of the 16 tonnes of scrap metal that they removed from applicants' possession at Costas Business Centre in Zvishavane on 1 September.
2. Second respondent pays applicants' costs of suit on the legal practitioner and client scale.

The facts of the matter as can be gleaned from first applicant's founding affidavit to which second applicant associated himself with are that,

1. The two applicants are into scrap metal buying and selling business.
2. In August 2022 second respondent approached her and advised her that that selling a scrapped case yellow (the machine) second respondent was acting as first respondent's agent in this transaction.
3. They agreed on the purchase price of the machine whereupon she paid US\$1800-00 to second respondent for onward transmission to the first respondent, thereafter she took possession of the machine and had it stripped realizing 14 tonnes of scrap metal.

4. On 24 August 2022 she transported the scrap metal to Costas Business Centre in Zvishavane where she assigned one Doubt Ncube to secure it while she looked for transport to ferry it to Harare.
5. On 31 August 2022, the respondents went to Costas Business Centre and without applicants consent and that of D Ncube, loaded the scrap metal into a truck and drove it to Harare. Applicants only came to know about this on 2 September 2022 through D Ncube and their investigations led to the recovery of the scrap metal in Harare.

Applicants aver that they were in peaceful and undisturbed possession of the scrap metal and the respondents dispossessed them unlawfully of the scrap metal.

All the respondents are opposed to the granting of the application.

From first respondent's long and winding narration of events, his position in that applicants never possessed the scrap metal. The scrap metal was his and he possessed it until he sold it to third respondent. The second applicant and second respondent were only involved in the cutting and transportation of the scrap. He dealt specifically with second respondent with whom he entered into a contract.

Second respondent also made a long and winding narration of events and eventually said applicants never possessed the scrap metal. He averred that he was told by first respondent's brother that first respondent had a machine he wanted to strip and this is when he involved the applicants. Applicants and him then drove to Mberengwa to meet first respondent, but first applicant remained in Zvishavane. In Mberengwa, they ie himself, first respondent, his brother and second applicant went to the site where the machine was and did a survey. They agreed they were to proceed to strip after effecting payment. First respondent wanted US\$2000-00 and he gave him US\$1800-00 after having borrowed US\$300-00 from applicants since he only had US\$1500-00. He submitted that the US\$1800-00 was for first respondent to allow them to be seen at his machine. At the site he directed the activities and delegated jobs and this was all in the presence of second applicant, first respondent and himself. Later first respondent sent him a message which he forwarded to applicants to the effect that if he does not pay US\$ 200-00 he (first respondent) will revert to the first buyer who is third respondent. Applicants' response was that first respondent cannot renege on the deal, and if he does so, they would sue. He went back to first respondent and advised him that he had failed to raise the US\$200-00 and was therefore seeking his refund. First respondent then called third respondent to come and buy the scrap metal, a deal he was not involved in but was present. He was then refunded US\$1600-00.

Third respondent's position was that applicants were not in peaceful possession. He did not commit any spoliation. He only came into the matrix at the invitation of first respondent. He then proceeded to cut the outstanding scrap metal at the site and collected that at Costas and proceeded to the weighbridge where the weight was recorded as 14740 tonnes. He then proceeded to transport it to Harare. He was not aware that there were other people who had possession. In the bush and on loading second respondent was present and indicated that he had resiled from the deal and what he wanted was a refund. He submitted further that it would be an injustice to him if he were deprived of the scrap as he did not involve himself in self-help. He would suffer financial prejudice since he paid for the scrap and its transportation.

He prayed for the dismissal of the application as the requirements for spoliation had not been met.

In an application such as this one, in order for applicant to be granted the order two requirements must be met. A plethora of cases in this jurisdiction have pronounced these requirements and the locus classicus is the case of

*Botha and Another*

v

*Barrett* 1996 (2) ZLR 73(S) at page 74 F G GUBBAY CJ held:

“to obtain a spoliation order, it must be shown that the applicant was in peaceful and undisturbed possession of the property and that the respondent deprived him of his possession forcibly or wrongfully against his consent. The *onus* is on the applicant to show that he did not consent. Consent may be given expressly or by implication”.

See also the case of

1. *H J Voster (Private) Limited*
2. Nevison Maketo

v

1. *Save Safaris (Private Limited)*
2. *Parks And Wildlife Management Authority*
3. *Minister Of Lands, Agriculture And Rural Settlement N.O*

SC 41/22

in which MWAYERA JA cited with approval and quoted the settled law as aptly enunciated by GUBBAY CJ in the *Botha & Anor v Barret case (supra)*.

What falls for determination *in casu* is whether applicants were in possession of the scrap metal and if so whether they were in peaceful and undisturbed possession and whether respondents deprived them of their possession forcibly or wrongfully against their consent.

From an analysis of the respondents' submissions, one can safely conclude that there is collusion among them so as to give the picture that applicants never were in possession of the scrap metal. Third respondent according to his submissions was not in the picture when the transaction between applicants', first and second respondents took place but he made the submissions that applicants were not in peaceful possession. Second respondent denied that he was first respondent's agent and yet he was actively involved with first respondent and with applicants. He paid first respondent the amount of US\$1800-00 which applicants stated they gave him US\$1800 for onward transmission to first respondent. First respondent does not dispute that he received US\$1800-00 from second respondent. His submission that he and the applicants drove from Harare to Mberengwa to meet first respondent and they all, except for first applicant, went to the site where the machine was. He and applicants did the stripping of the machine. First respondent was aware of this. The scrap metal was thereafter ferried to Costas Business Centre where it was left in the custody of one D Ncube by the applicants for safe keeping, while they looked for transport to carry it to Harare. Why would applicants go to all this length if all they were supposed to do for second respondent was to strip and transport only? Why would second respondent forward a message by first respondent in which he was demanding the balance of US\$200-00 from him to applicants if applicants were not the possessors of the scrap metal. The submission by second respondent on how the applicants reacted, threatening to sue first respondent if he reneged on the transaction is quite telling. It goes to support applicants' position that they possessed the scrap metal after having bought it. It is not in dispute that third respondent collected some scrap metal from Costas Business Centre after buying it from first respondent.

I am satisfied from all the above that applicants were in possession of the scrap metal, their possession was peaceful and undisturbed. Applicants were wrongfully dispossessed of the scrap metal. The dispossession was without their consent.

From the facts and submissions made, it is clear third respondent was a victim of the other respondents' deeds. However, this does not rule out the fact that applicants were despoiled and are entitled to the relief they are seeking.

Applicants are seeking costs against second respondent only, on a legal practitioner and client scale on the basis that he allowed third respondent to load and dispossess applicants knowing fully well that what first and third respondents were doing was unlawful. He was present during

the transaction between applicants and first respondent and between first respondent and third respondent. His conduct is highly reprehensible.

I agree with applicants' submissions on this issue of costs. Second respondent was actively involved in these deals, he was not a silent observer during the transaction between first and third respondents as he would like me to believe. I will therefore grant costs as prayed for by applicants. All having been considered, it is my finding that:

1. Applicants were in peaceful and undisturbed possession of the scrap metal.
2. Respondents despoiled applicants of the scrap metal wrongfully and without their consent.

Consequently the application is granted and respondents are ordered to restore applicants' possession of the 14 tonnes of scrap metal that respondents removed from Costas Business Centre Zvishavane on 1 September 2022.

Second respondent shall bear costs of suit on a legal practitioner and client scale.

There is no order of costs against first and third respondents.

*Gill Godlonton & Gerrans*, applicants' legal practitioners  
*Chitere Chidawanyika and Partners*, third respondent's legal practitioners