

WONDER MUNETSI  
versus  
RUMBIDZAI MASAIRE  
and  
PETER RUTURI

HIGH COURT OF ZIMBABWE  
TAGU AND MAXWELL JJ  
HARARE 23 June & 2 November 2022

*Mufunda N. K.*, for the appellant  
*K. Tundu*, for the respondents

### **Civil Appeal**

**TAGU J:** This is an appeal against the whole judgment of the Harare Magistrates Court (Civil) handed down on 1 March 2022 under Case number 1/22 which dismissed an application for *mandament van spolie* made by the Appellant against the respondents for illegally ousting Appellant from Stand number 13559 Manresa Mabvuku, Harare (the property).

The background facts are that there has been a dispute between the Appellant and the respondents over the property in question. Under case number 2689/20 an Order was granted against the Appellant in favour of the respondents to evict the Appellant from the stand in question. Pursuant to that Order the Appellant noted an appeal being CIV APP 138/21. According to the Order from the High Court the matter was struck off the roll and the Appellant was ordered to pay costs because the Appellant took over one year to file the appeal. On or about the 25 of December 2021 first and second Respondents brought bricks on the property, forcibly and unlawfully evicted Herbert Munetsi Appellant's brother and proceeded to dig up a foundation and began brick laying.

This prompted the Appellant to file an application for *Mandamant Van Spolie* Order in the court a quo. In dismissing the application the court *a quo* stated that the Appellant was in defiance of the law by continued occupation of the said property after he lost under case 2689/20 as well as the appeal.

Having been dissatisfied with the court's ruling, the Appellant filed the present appeal.

## **THE GROUNDS OF APPEAL**

1. The magistrate erred at law by determining an application for *mandament van spolie* on parties' rights to the property.
2. The magistrate misdirected himself on both the facts and the law by finding that the respondents acted lawfully by ousting the appellant from possession of the stand number 13559 Manresa Mabvuku Harare without a warrant for eviction.
3. The magistrate grossly erred at both the facts and the law by finding that the appellant was in defiance of a lawful court order.
4. The court *a quo* grossly erred at law by finding that the appellant was not in peaceful possession of the property.

The court a quo properly stated the law applicable in an application of this nature when it said:

“This court is alive to the fact that in spoliation, it is trite that the lawfulness of the possession challenged is not an issue as spoliation requires the restoration of the *status quo* ante pending the determination of the dispute between parties.”

However, the court a quo then erred in the application of the law. It is indeed correct that the Respondents had a court order. The Respondents then took the law into their own hands. What the Respondents should have done was to get a writ/warrant of ejection and the Sheriff or his depute should then have evicted the Appellant and handed over the property to the Respondents lawfully. The Appellant property stated that he was in peaceful possession and was despoiled without the Respondents following due process. In an application for spoliation the court does not concern itself with the ownership of the item in dispute. It is trite that even a thief may be despoiled of the stolen items.

For these reasons the court *a quo* ought to have granted the order sought.

## **IT IS ORDERED THAT**

1. That the appeal be and is hereby granted.
2. That the dismissal of the application for *mandament van spolie* by the court *a quo* be and is hereby set aside and be substituted by the following:
  - a) The application for *mandament van spolie* be and is hereby granted.

- b) The respondents are ordered to return stand number 13559 to its *status quo-ante* before 25 December 2021, meaning they are to vacate from the property.
- c) The respondents are to pay costs of suit.

TAGU J: .....

MAXWELL J:..... Agrees

*Mufunda & partners*, appellant's legal practitioners  
*Chihambakwe Mutizwa & partners*, first and second respondents' legal practitioners