

CHARLES CHIWAYA	APPLICANT
versus	
CEASER JULIOUS MANYUNYI	1ST RESPONDENT
And	
NATHAN MUNYUNYI	2ND RESPONDENT
and	
ZRP (SUPERITENDENT) MAKAVANGA	3RD RESPONDENT
and	
ZNA (LIEUTENANT COLONEL) M. FANA	4TH RESPONDENT
and	
THE COMMISSIONER GENERAL OF POLICE	5TH RESPONDENT
and	
THE COMMANDER ZIMBABWE NATIONAL ARMY	6th RESPONDENT

HIGH COURT OF ZIMBABWE
MUZENDA J
MUTARE, 24 February 2022

Urgent Chamber Application

A. *Mugiya*, for the Applicant.
V, *Chinzamba*, for 1st and 2nd Respondents.
P. *Garwe*, for 3rd to 6th Respondents.

MUZENDA J: On 18 February 2022 applicant approached the court seeking a spoliation order as per his draft crafted as follows:

“IT IS HEREBY ORDERED THAT:

1. The respondents are barred and stopped from preventing the applicant or members of his family from accessing their rural home.
2. The respondents are barred from stopping the applicant from building temporary or permanent structures on his homestead
3. Respondents are ordered not to interfere with applicant’s property in whatever manner without a valid court order.
4. Respondents are ordered not to evict the applicant from his home without a valid court order.
5. Fourth and fifth respondents are ordered to remove any members of the armed forces who might be guarding applicant’s home in order to prevent the applicant from accessing it.
6. The first to the fourth respondents are ordered jointly and severally one paying the other to be absolved to pay costs on a legal practitioner client scale”

On the date of hearing no opposing papers had been filed. However Mr *Chinzamba* and Mr *Garwe* appeared for all the respondents.

Background Facts.

The facts appear in applicant's founding affidavit. Applicant occupied a piece of communal land in Chibvembe Village, Chief Katerere in Nyanga in 2004. He established a homestead, cattle pens and temporary structures. He is not an illegal miner nor an illegal occupier. However his homestead is surrounded by mining claims, Chisero Mining Syndicate is located at a distance of 500m from his homestead. The record shows a history of court cases brought against the applicant however among all those papers is no extant order against the applicant.

On 8 February 2022 a group of police details, members of the army and people claiming to be mining claims owners approached applicant. They burnt down applicant's homestead and chased him away. The respondents' action was to eradicate illegal gold panners or invaders. Applicant was disowned of his rural home and now squatters in Mutare town.

Third to sixth respondent's legal practitioner submitted from the bar that third to sixth respondents were carrying out an operation to remove illegal miners from authorised registered mining companies or syndicates. However he candidly admitted that the third to sixth respondents did not have any lawful court order to carry out the operation. No sheriff of the High Court was present and literally the whole operation did not have any legal basis.

Mr *Chinzamba*, for first and second respondents pointed out the documents filed by the applicant showed material disputes of fact incapable of being resolved on paper, he however conceded that the destruction of applicant's property and his eviction on 8 February 2022 had no legal foundation.

Consequently all the facts spelt out by applicant in his papers are not disputed by the respondents. Apparently they concede that the respondents did not have a legal court order to act in the manner they did. The action of respondents deprived the applicant a place to stay and ejected him.

The Law

In the case of *Augustine Banga and others v Solomon Zawe*¹ the requirements of spoliation were spelt out as follows:

- (i) The applicant was in peaceful and undisturbed possession of the thing and

¹ SC 54/14 per GWAUNZA JA (as she then was)

(ii) He was unlawfully deprived of such possession

in *Chisveto v Minister of Local Government and Town Planning*² it crisply stated:

“It is a well recognised principle that in spoliation proceedings, it need only be proved that the applicant was in possession of something, that there was a forcible or wrongful interference with his possession of that thing that *spoliatus ante omnia sedituendus est*. Lawfulness of possession does not enter into it. The purpose of the *mandamns van spolie* is to preserve law and order and to discourage persons from taking the law into their own hands....”

Applying law to the facts.

Respondents are alleged to have been obeying an instruction from the fifth respondent, there is nothing untoward about police doing their national duty but all that must be done within the four corners of the law in total adherence to the constitution and following the due process of the law more particularly where shelter of the affected person is at stake. This is a rainy season and respondents without notice without a court order literally condemns applicant and his family into the bush. There is no excuse in my view that justifies such an inhuman inconsiderate course of action. Respondents did not have a valid court order to execute any destruction or ejection of applicant and his property. Courts cannot stand by when ‘disciplined’ forces deliberately resort to self help for whatever reason compromising rule of law which they swore to jealously guard.

I am satisfied that applicant has met all the requirements of spoliation and his application is granted as per draft order with costs at an ordinary scale of party and party

Mugiya & Muvhami Law Chambers, for Applicant.
Mugadza Chinzamba and Partners, for 1st and 2nd Respondents
Civil Division of the Attorney General’s office, for 3rd – 6th Respondents.

² 1984 (1) ZLR 240(H) per REYNOLDS J, at 250 A-D