

SECE NYATHI

VERSUS

ROSEMARY NYATHI(NEE SIBANDA)

IN THE HIGH COURT OF ZIMBABWE
MOYO J
BULAWAYO 20 JANUARY AND 20 FEBRUARY 2014

Moyo-Majwabu for the applicant
Mazibuko for the respondent

Opposed matter

MOYO J: This is an application for the restoration of matrimonial property to the parties' matrimonial home namely, No. 11 Kayton Avenue, Richmond, Bulawayo.

The Applicant and the Respondent are husband and wife. The Applicant alleges that on the 3rd of March 2013, while driving outside Bulawayo, going to his rural home, he was called by a police officer who directed him to come back to Bulawayo urgently as there were people waiting for him at his house. Applicant alleges that he tried to reason with the police officer advising him that he would come back later as he was on his way to his rural home and was almost there. He alleges that the police officer, who had advised him that he was calling from Sauerstown Police station advised him to come back as his failure to do so would result in him suffering unspecified consequences. He alleges that he then turned back and when he got to his house he found 2 police officers, his father-in-law, brother and sister-in-law with the Respondent. He stated that he greeted them and then one of the police officers showed him a letter from Respondent's lawyers, the letter was annexed and marked Annexure "A" to applicant's papers. He alleged that he read the letter and he noted that the last paragraph was instructing him not to hinder the Respondent from taking so much of the matrimonial assets as she wanted. He alleges that he told the police that he did not accept the contents of the letter from the Respondent's lawyers.

He further alleges that the police officer then told him the reason they (the police) were present was to ensure that Applicant did not obstruct the Respondent from doing what the letter instructed. He alleges that the police officer then instructed the Respondent to proceed and take

the property that she needed.

The letter from Respondent's lawyers was demanding that Applicant allows the Respondent to take the property that she needed as she was then moving out of the matrimonial home.

The property that Respondent allegedly removed was listed and annexed as Annexure "B".

Applicant alleges that Respondent did not leave any meaningful property except for the dining room suite, lounge suite and a cooker. He further alleges that the dining room suite and the lounge suite are assets that Respondent found him with when they got married.

He alleges that Respondent took away all the property that was acquired during the subsistence of the marriage. He further alleges that Respondent even took his personal documents and this he says is evidenced by Annexure "C" the letter Respondent's lawyers wrote to Applicant's lawyers dated 15 March 2013, wherein they were returning an envelope containing Applicant's personal documents, such as his National I.D, Birth certificate, motor vehicle documents, amongst others.

Applicant seeks the return of these assets to the matrimonial home as he alleges Respondent committed an act of spoliation. Respondent alleges that the parties have had a tumultuous union since 1991. She alleges that the Applicant is a violent man and that there are numerous reports of violence that she has made to the police at Sauerstown Police Station.

She confirms that she indeed caused her legal practitioners to write the letter marked as Annexure "A". She states that she did this as she feared Applicant's violent tendencies. She states that the two police officers were meant to ensure that Applicant kept the peace while she moved out of the matrimonial home. She states that her relatives came along in case the Applicant wanted to discuss some issues.

Respondent's counsel submitted that his matter could not be resolved on paper as it is fraught with factual disputes hence it should be dismissed as Applicant approached this court on the wrong platform. I do not agree with Respondent's submission in that regard for I am of the view that the papers submitted by Applicant (Annexure A and B) together with Respondent's agreement to the fact that indeed two police officers and Respondent's relatives were present, leave no other factual dispute that is material to the determination of this application as there is only one issue to be determined by this court. The issue is, was there consent on the part of the

Applicant with regard to the removal of the matrimonial property by Respondent?

Such issue I am satisfied can be determined on the basis of the information contained in the affidavits and the annexures.

Applicant states that he never consented to the removal of the assets from No. 11 Kayton Avenue, Richmond. Respondent insists that Applicant indeed consented to the move.

The letter from Respondent's lawyers addressed to Applicant, *inter alia* states thus, in the last paragraph:-

“Because of the climate of fear in the matrimonial home our client has decided that she is going to move out of the matrimonial house. We therefore demand that pending her moving out, you stop your acts of domestic violence/abuse and when she moves out that you allow her to leave in peace and not to hinder her from taking so much of the matrimonial assets as she requires for her and the children's' survival until such time as the issues between yourselves have been resolved either amicably or through the courts. (emphasis mine).

The wording of this letter is such that a demand is being made to the Applicant by the Respondent's lawyers. From the wording of the letter certainly there can be no room for either consenting or rejection of the demand. The wording is peremptory, its a demand, a directive, an instruction, and certainly far from being a request.

As if that was not enough, the letter is handed to the Applicant by a police officer in the presence of another police officer and three of Respondent's relatives. The Applicant certainly could not have been left with any options in such an environment, with two police officers armed with a demand from lawyers and three of his in-laws being present.

Annexure “B”, the letter from Respondent's lawyers, despatching Applicant's personal documents is also indicative of the situation that Applicant must have found himself in. It would not make any sense that Applicant, been having consented to the removal of the matrimonial assets, would let Respondent take away his personal documents including his national identity card. If he had been a willing participant in this exercise he certainly would have made sure some of his personal items and other households goods remained in his custody. The mere fact that the Respondent collected even those of Applicant's personal items is a pointer to the fact that Applicant had been stripped of any freedom or volition in so far as the whole exercise was concerned. The requirements for a spoliation suit or action are that the Applicant must allege and prove that he was in peaceful and undisturbed possession of the property in question and that he was unlawfully deprived of such possession by the Respondent. “Unlawful” would mean without

the Applicant's consent or without due legal process. Refer to *Kgosana v Otto* 1991(2) SA 113.

I find that a lay person in Applicant's situation as enunciated above could not have given his consent under the prevailing circumstances. Respondent should return the items listed in the amended draft order.

I accordingly grant the application in terms of the amended draft. Consequently the application succeeds with costs.

Messrs James, Moyo-Majwabu & Nyoni, applicant's legal practitioners
Calderwood, Bryce Hendrie & partners, respondent's legal practitioners