MARRY MUBAIWA-CHIWENGA
versus
CONSTANTINO GUVHEYA DOMINIC NYIKADZINO CHIWENGA

HIGH COURT OF ZIMBABWE
DUBE-BANDA J
HARARE, 21 January 2020 and 24 January 2020

Urgent chamber application

T.N. Nyamakura, for the applicant
L. Uriri, for the respondent

DUBE-BANDA J: This is an urgent application. This application was lodged in this court on the 9 January 2020 and heard on 21 January 2020. On that day, the parties were requested to address the preliminary points as well as the merits of the case. At the end of the hearing, judgment was reserved.

I need to point out that at the end of hearing the legal practitioners of the parties undertook to provide the court with written heads of argument, containing authorities they relied on during their submissions. The hearing was on the 21 January 2020 and such heads of argument were due on the 22 January 2020 at 8:15. Applicant's legal practitioners did file their heads of argument, however respondent's legal practitioners did not file. I had to prepare this judgment and could not wait for respondent legal practitioners to file their heads of argument, because this is an urgent matter and must be concluded expeditiously and without undue delay.

In any event no prejudice will be befall respondent as a result of this omission. I say so because, the parties fully argued and re-argued their respective cases with admirable articulacy and skill. Further this matter turns on the evidence contained in the affidavits filed of record. The heads were only meant to give full citation of the authorities relied on and the long quotations relied on.

Applicant is the estranged wife of the Vice-President of the Republic of Zimbabwe, and the respondent is the Vice-President himself. The applicant approached this court on an urgent basis seeking an order drawn in the following terms-

Terms of the final order

That you now show cause to this Honourable Court why a Final Order should not be made on the following terms:

1. The respondent is hereby interdicted and restrained from interfering with applicant's access, to, use and enjoyment of the property namely 614 Nick Price Drive, Borrowdale Brooke, Borrowdale, Harare and her business premises at Orchid Gardens Domboshawa, Harare pending the conclusion of the matrimonial proceedings under case number HC 9837/19.
2. The respondent is hereby interdicted and restrained from removing the minor children, namely Tendai Dominique Chiwenga (Born 4 November 2011), Christian Tawanazororo Chiwenga (Born 15 November 2012), and Michael Alexander Tadisiswa Chiwenga (Born 13 February 2014) from applicant's custody.
3. The respondent is ordered to pay applicant's costs on a punitive scale taxable as between legal practitioner and own client.

Interim order granted

Pending determination of this matter, the applicant is granted the following relief:

1. An order directing the respondent:
   1.1.1. to forthwith allow the applicant access to the matrimonial home, namely 614 Nick Price Drive, Borrowdale Brooke, Borrowdale, Harare within two hours of the grant of an order to that effect and such order includes:
   1.1.2. access to and use of applicants personal motor vehicles, namely Toyota Lexus, Mercedes Benz S400, Mercedes Benz E350 (Black), and Mercedes Benz;
   1.1.3. access to her clothing, personal goods and effects; and
   1.1.4. return of her safes containing her personal items taken out of the matrimonial home and allegedly given to the respondent's legal practitioner to keep in trust.
2. An order directing the respondent, within two hours of such an order, to return the minor children, namely Tendai Dominique Chiwenga (Born 4 November 2011), Christian Tawanazororo Chiwenga (Born 15 November 2012), and Michael Alexander Tadisiswa Chiwenga (Born 13 February 2014) to the applicant.
3. An order directing the respondent, personally or through the agency of persons such as Colonel Mangezi to return all furniture, goods and effects removed from business

premises at Orchid Gardens using a Zimbabwe National Army motor vehicle within twenty-four hours of an order to that effect.

4. An order directing that the High Court withholds its jurisdiction to hear the respondent in the present or any suit in this court until he purges his dirty hands.
5. An order directing the Sheriff of the High Court, with the assistance of the Zimbabwe Republic Police, to give effect to this order forthwith.

Service of the provisional order

Service of this provisional order shall be effected by the applicant's legal practitioners or by the Sheriff of the High Court of Zimbabwe or his lawful deputy.

Mr *Nyamakura,* counsel for the applicant, during his submissions advised that applicant was not persisting with *paragraph* 4 of the interim relief sought, which reads as follows "an order directing that the High Court withholds its jurisdiction to hear the respondent in the present or any suit in this court until he purges his dirty hands." As a result, no further reference would be made to this issue.

Background facts

The parties are married to each other, *albeit* customarily, and the marriage still subsists. There are three minor children, namely *Tendai Dominique Chiwenga, Christian Tawanazororo Chiwenga,* and *Michael Alexander Tadisiswa Chiwenga.* In June 2019, respondent went overseas for the purposes of receiving medical treatment. When he came back to the country he did not return to number 614 Nick Price Drive, Borrowdale Brooke, Borrowdale, Harare (property), the parties' matrimonial home. Applicant was arrested on the 14 December 2019. On the 6 January she was admitted to bail pending trial. During applicant's incarceration, respondent returned to the matrimonial home. Upon her admission to bail, applicant contends that she was not permitted to enter the property. She was denied custody and access to the minor children of the marriage. In answer to being refused entry into the matrimonial home, being denied custody and access to the minor children, applicant filed this urgent application with this court.

Preliminary points

At the hearing of this application, respondent raised a number of preliminary points. He contends that this matter is not urgent. According to him, this is a matter which is a waste of

the court's time. It is also contended that the founding affidavit contains inadmissible hearsay evidence, and therefore, it is inadmissible.

I turn to the deal in detail with the preliminary points.

It is argued that this matter is not urgent. It is said urgency has not been ventilated on the papers.

The certificate urgency filed in terms of rule 244 of the High Court Rules, 1971 (Rules) provides as follows:

1. It is a fundamental rule of our law that no one is above the law and that no one is allowed to resort to self-help without recourse to the remedies provided in the law. I note from the founding affidavit that the applicant resides at number 614 Nick Price Drive, Borrowdale Brooke, Borrowdale, Harare, prior to her removal from the premises when she was arrested by members of the Zimbabwe Anti-Corruption Commission. The respondent had not resided at the said premises for a period of four more than months prior to the arrest.
2. The respondent may not wish to reside with the applicant, but in the absence of a court order, he has no right to bar her from entering or residing at the erstwhile matrimonial home.
3. I also note from the founding affidavit that the applicant's property, her cars, personal clothing and effects are still at the property where her mother was able to procure some of the items during applicant's incarceration.
4. The conduct of the respondent has the potential to (1) render the applicant destitute, (2) frustrate her compliance with bail conditions and place her in serious jeopardy and (3) bring the standing of the status of the rule of law in Zimbabwe into serious disrepute.
5. It must not be forgotten that the respondent is no ordinary citizen, and his conduct is particularly objectionable as he has taken an oath to uphold the laws of Zimbabwe.
6. I note the particularly distressing issue that the applicant has not been allowed access to her children, all of whom are minors. Even if it was contemplated by the respondent that applicant be removed from the matrimonial home, and such conduct was lawful, our laws clearly provide that the children ought to be with her as a matter of law. This is urgent issue and deserves urgent attention.

7. A matter that involves children, is by its nature urgent. Our law also accepts that by their nature spoliation and like proceedings are urgent. For these reasons I have formed the opinion that the matter is urgent.
8. In view of the explanation given and the events as narrated in the founding affidavit, the need to act can only be taken to have arisen after the 6th January 2020, and also in consideration of further acts of spoliation that occurred up to the 9th January 2020.
9. The applicant has clearly acted with urgency, and in so doing demonstrated by her own conduct that she considers that the matter is urgent.

Urgent applications are governed by rule 244 of the High Court Rules, 1971 (Rules), which provides that:

> "Where a chamber application is accompanied by a certificate from a legal practitioner in terms of paragraph (*b*) of subrule (2) of rule 242 to the effect that the matter is urgent, giving reasons for its urgency, the registrar shall immediately submit it to a judge, who shall consider the papers forthwith.
>
> Provided that, before granting or refusing the order sought, the judge may direct that any interested person be invited to make representations, in such manner and within such time as the judge may direct, as to whether the application should be treated as urgent."

This court thus enjoys a discretion in urgent applications to authorise a departure from the ordinary procedures that are prescribed by its Rules. The court is usually hesitant to dispense with its ordinary procedures, and when it does, the matter must be so urgent that ordinary procedures would not suffice.

In the ordinary run of things, court cases must be heard strictly on a first come first serve basis. It is only in exceptional circumstances that a party should be allowed to jump the queue on the roll and have its matter heard on an urgent basis. The *onus* of showing that the matter is indeed urgent rests with the applicant. An urgent application amounts to an extraordinary remedy where a party seeks to gain an advantage over other litigants by jumping the queue. And have its matter given preference over other pending matters. That indulgence can only be granted by a judge after considering all the relevant factors and concluding that the matter is indeed urgent and cannot wait. See *Kuvarega* v *Registrar General and Another* 1998 (1) ZLR 188.

In assessing whether an application is urgent, this court has in the past considered various factors, including, among others: the consequence of the relief not being granted;

whether the relief would become irrelevant if it is not immediately granted and whether the urgency was self-created.

I have to determine on a factual matrix of this case, whether applicant has indeed discharged the *onus* of showing that this matter is urgent and cannot wait in the long que of cases already before court. Should applicant be allowed to jump the queue and have her case given preference over other pending matters?

Firstly, and most importantly, this matter involves the welfare of minor children. This court by virtue of section 81(3) of the Constitution of Zimbabwe Amendment (No. 20) Act 2013 (Constitution) is the upper guardian of all minor children in this country. This court must endeavour to deal expeditiously with a matter that involves the welfare of minor children. As a result, I am of the view that this qualifies this matter to be accorded an urgent status.

Secondly, there is an allegation that respondent has been refused entry to her matrimonial home. This, it is contended has been achieved through an act of spoliation and without following due process of law. Section 74 of the Constitution provides that no person may be evicted from their home without an order of court made after considering all the relevant circumstances. Respondent says what applicant did not disclose is that, the house is his, it is of sentimental value to him, and he was awarded it by a court order following a divorce matter between him and his former wife. With respect to the respondent, this allegation cannot defeat the urgency of the matter. I find that the allegation that applicant has been arbitrarily ejected from her home without a court order qualifies this matter to be treated with urgency.

The factual matrix of this case shows that the need to act arose on the 6th January 2020. Applicant could not have acted while she was still incarcerated in prison. Respondent says the fact that applicant was arrested for transgressing the law, is not his problem. However, my view is that the conduct of the respondent that is complained of allegedly occurred starting from the 6 January going forward. It is further alleged that some acts complained of by the applicant occurred on the 8th January 2020. This application was filed on the 13 January 2019. From these facts, I find that applicant acted timeously to protect her interests. I find that the urgency in this matter is not self-created. Applicant, by launching this application on the 9 January acted timeously and with speed.

In conclusion, I find that the applicant has discharged the *onus* on her of showing that this matter is urgent and qualifies to be treated as such by this court. This preliminary point attacking the urgency of the matter fails and is accordingly refused.

It is argued by respondent that the founding affidavit contains inadmissible hearsay evidence. It is contended that in terms of rule 227 (4) (b), which says an affidavit filed with a written application shall be made by the applicant or respondent, as the case may be, or by a person who can swear to the facts or averments set out therein. Examples are given of averments which applicant has no personal knowledge of, in *paragraph* 16 of her founding affidavit, she says "as I was in prison pending bail proceedings, I had no capacity to know what was occurring with my belongings. I am aware that my mother was directed to request authority from *Mr Wilson Manase*, before she could access the matrimonial home during my stay in Chikurubi." In *paragraph* 23 of her founding affidavit she says "I must pause here and state that while in prison, I sent my mother to collect personal items that I needed to use from the matrimonial home. She was denied access by one Lt Colonel *Muradzi* together with Lt Colonel *Mangezi*." They are other few instances again were applicant relies on information gathered from third parties.

My humble view is that even if the founding affidavit contains hearsay evidence here and there, this does not render the whole affidavit inadmissible. Even if one were to accept that the opposing affidavit contains hearsay evidence, such qualifies as first-hand hearsay and admissible in terms of section 27 of the Civil Evidence Act [Chapter 8:01], which provides that:

> "Subject to this section evidence of a statement made by any person, whether orally or in writing or otherwise, shall be admissible in civil proceedings as evidence of any fact mentioned or disclosed in the statements, if direct oral evidence by that person of that fact would be admissible in those proceedings."

See *Hiltumen v Hiltumen* 2008 (2) ZLR 296.

It only becomes a question of weight, i.e. what weight should this court attach to such evidence. Further, as it will appear later in this judgment, this matter does not turn on such averments. In the main, it turns on common cause facts and those facts that are not seriously disputed. As a result this point *in limine* has no merit and is refused.

In conclusion, on the preliminary points, I am of the view that a matter that touches on the welfare of minor children, courts should be slow to place barriers before the doors of the court. I find that all the preliminary points have no merit and are refused.

Applicant's case

Applicant's case is that she was arrested on the 14 December 2019 and remained in custody until she was admitted to on 6 January 2020. She says she was arrested at the matrimonial home of the parties, being number 614 Nick Price Drive, Borrowdale Brooke, Borrowdale, Harare. She says all her personal goods and effects, being motor vehicles and other items are at the property. To show that the property is the matrimonial home, that is where the parties reside, she makes the point that in a case pending before this court under cover of case number HH 9873/19, respondent who is plaintiff therein seeks her eviction from the same property.

She contends that on her admission to bail, she was refused entry to the property by members of the military, that is Presidential Guard. She says a member of the military manning the gate to the property advised her that respondent was not home, he (respondent) ordered that no one should be allowed to enter or leave home during his absence. Applicant says on the 8th January 2020 she went to Orchid Gardens, a business premise that she says she owns, and found thereat armed members of the Presidential Guard. She says she was again refused entrance to the business premises.

She alleges that her three minor children were unlawfully taken away from her custody. She says she is not aware of their location and she has not been allowed to see them. However, she made a concession during the hearing that she managed to see the children once when they were taken from school.

According to the applicant, the use of the armed forces in this matter exhibits and speaks volumes of the extent of the abuse of public power by the respondent. She says the fact that the respondent is the Vice-President of the Republic does not make him immune to the law, he cannot do as he pleases. The applicant's founding affidavit is replete with allegations that respondent is abusing his public office and is acting outside the law.

There is documentary evidence, by way of photographs, showing a person standing on what looks like a gate, applicant says these photographs depict her standing at the gate and being refused entrance to the matrimonial home. The admissibility of these photographs has not been placed in issue by the respondent. I therefore accept that these photographs depict and tell a story what applicant says they do, i.e. her standing at the gate of the matrimonial home and being refused entrance.

On the 7 January 2020, respondent's legal practitioners addressed a letter to applicant's legal practitioners and made the point that applicant as part of her bail conditions was ordered not to interfere with witnesses, and respondent was one of such witnesses. She could not therefore come to the residence where complainant resides.

Respondent's case

Respondent says the parties lived together on the premises as husband and wife. To use his words, tables only turned when applicant was arrested and placed in custody. Respondent's case is that applicant can no longer be allowed to occupy the premises known as 614 Nick Price Drive, Borrowdale Brooke, Borrowdale, Harare, as it is the residence of the Acting President of the Republic. This is the theme that permeates through the entirety respondent's of the notice of opposition. He further says the property is of sentimental value to him, it was awarded to him during his former divorce. He says when he returned from China he had no other home to stay. He returned to the property after the arrests of the applicant, this must have been after the 14 December 2019. He alleges that applicant has an alternative accommodation, she can reside at such accommodation. He contends that he is a state witness in the pending criminal case against the applicant. Applicant was admitted to bail and one of the conditions for such admission is that she was barred from interfering with witnesses. It is said, it is now unattainable for applicant to move to the property because of the bail order. Therefore the two cannot reside at the same home.

Respondent, to use his exact words, says "she cannot come and live with me. She is not a destitute. As Vice President of Zimbabwe, I have no other residence to live in. In any case I am there, she cannot interfere with a state witnesses. She is very violent and abusive." The point is made by the respondent that he has instructed his legal practitioners of record, to address a letter to the Prosecutor-General to apply to court to amend that portion of the bail order which says applicant shall reside at number 614 Nick Price Drive, Borrowdale Brooke, Borrowdale, Harare.

The Prosecutor-General of the Zimbabwe has acceded to the request made at the respondent's specific instance and request. I say so because during the hearing, Mr *Uriri*, counsel for the respondent, produced a copy of a court application with the title "Court application for alteration of recognizances in terms of section 126 of the Criminal Procedure and Evidence Act [*Chapter 9:07*]." What is sought to be amended, amongst other conditions, is the "condition under 2 (c) in case B3004/19 and under 3 in case B3008/19 be and is hereby

altered to read that the accused is to reside at an alternative address that she will furnish to the court."

It is clear from the respondent's version, that he is the one who does not accept applicant at the matrimonial home.

Facts that are either common cause or not serious disputed

In application proceedings, it is a general rule that where a dispute of fact has arisen on the affidavits, a final order may be granted if those facts averred in the applicant's affidavits which have been admitted by the respondent, together with the facts alleged by the respondent, justify such an order. The power of the court to give such final relief on the papers before it, is however not confined to such a situation. In certain instances the denial by respondent of a fact alleged by the applicant may not be such as to raise a real, genuine or *bona fide* dispute of fact. See *Plascon-Evans Paints Limited v Van Riebeeck Paints (Proprietary) Limited, Room Hire Co. (Pty) Ltd v JeppeStreet Mansions* (Pty) Ltd, 1949 (3) SA 1155 (T), at pp 1163-5; *Da Mata v Otto, NO*, 1972 (3) SA 585 (A), at p 882 D - H). Therefore in application proceedings a court may grant a final order based on common cause facts; facts not seriously disputed and facts not disputed at all.

The following are facts that are either common cause or not seriously disputed. Applicant resides at number 614 Nick Price Drive, Borrowdale Brooke, Borrowdale, Harare. It is from this address that she was arrested and taken into custody on the 14 December 2020. Upon her admission to bail on the 6 January 2020 she returned to the property. Even the *Request for Remand Form* (in the criminal matter) indicates that her residential address is number 614 Nick Price Drive, Borrowdale Brooke, Borrowdale, Harare. On her admission to bail she was refused entry into the property. This refusal was done by the members of the military who guard the premises. Her clothes and other personal effects are at the property. A close look at the opposing affidavit leaves one in no doubt that the refusal to allow applicant to the property was at the sole behest of the respondent. He says, applicant cannot come to stay with me, and he gives his reasons. Again respondent has through his legal practitioners asked the Prosecutor-General to seek an amendment to the bail order whose effect would be to bar applicant from entering the property.

In the case pending before this court under cover of case number HH 9873/19, respondent who is plaintiff therein seeks her eviction from the property. It is common sense that she cannot be sought to be evicted from a property she does not reside.

Therefore, I find on the uncontested facts that applicant was barred entering number 614 Nick Price Drive, Borrowdale Brooke, Borrowdale, Harare. She was removed from the property without her consent and without due process of law.

The facts show that the separation of the parties occurred on the 6 January when applicant was refused entry to the matrimonial home. Prior to that date, she was resident at the property, although from the 14 December 2019 to 6 January 2020 she was in prison. My view is that prison is no home to anyone. It is a temporary place for incarceration. Her home remained and still remains number 614 Nick Price Drive, Borrowdale Brooke, Borrowdale, Harare. This explains why even after release from prison she returned to this property.

Again the uncontroverted facts disclose that applicant was barred from entering the business premises called Orchid. Respondent does not contest this fact, he attempts to explain it.

Respondent accepts that upon his return from China he did not return to number 614 Nick Price Drive, Borrowdale Brooke, Borrowdale, Harare. He stayed elsewhere. He says he returned to the property after the arrest of the applicant. He proffers reasons for his absence from the property. For applicant, immediately after release from custody she returned to the matrimonial home.

The papers before me are voluminous. The application has eighty-four pages, the notice of opposition has seventy-seven pages and the answering affidavit has twenty-five pages. A reading of the papers shows that, notwithstanding the volumes of papers, on the key issues, there is no material dispute at all. The resolution of this dispute turns on the common cause facts and facts that are either admitted or not seriously disputed.

The law

Applicant's case is anchored on spoliation. This is a possessory remedy. The objects of spoliation are as follows: to restore the possession of the things possessed; to put a stop to unlawfully taking the law into one's own hands; to protect the person who apparently has a possessory right and to prevent disturbance of public peace. In the case of *Botha & Anor* v *Barrett* 1996 (2) ZLR 73 (S) GUBBAY CJ stated as follows at p 79 D-E: It is clear law that in order to obtain a spoliation order two allegations must be made and proved. These are: that the applicant was in peaceful and undisturbed possession of the property; and, that the respondent

deprived him of the possession forcibly or wrongfully against his consent. See *Magadzire* v *Magadzire & Ors* SC 196/98, *Botha & Anor* v *Barret* 1996 (20 ZLR 73 (S).

In order to make a determination of whether or not the applicant was despoiled it is necessary to prove the two factors stated above.

It has been stated in a number of cases that issues of rights are irrelevant in spoliation proceedings. In *Yeko* v *Oana* 1973 (4) SA 735 (AD) at 739 G it was stated that the fundamental principle of the remedy is that no one is allowed to take the law into his own hands. All that the *spoliata* has to prove, is possession of a kind which warrants the protection accorded by the remedy, and that he was unlawfully ousted. In the case of *Chisveto* v *Minister of Local Government and Town Planning* 1984 (1) ZLR 248 (H) the court remarked:

> "Lawfulness of possession does not enter into it. The purpose of the *mandamus van spolie* is to preserve law and order and to discourage persons from taking the law into their own hands. To give effect to these principles, it is necessary for the status *quo ante* to be restored until such time as a competent court of law assess the relative merits of the claims by each party... In fact, the classic generalisation is sometimes made that in respect of spoliation actions even a robber or thief is entitled to be restored possession of the stolen property".

In my view what applicant has to establish in this case is that she was in peaceful and undisturbed possession of the property; and that the respondent deprived her of the possession forcibly or wrongfully against her consent. The issue of who owns what does not come in the inquiry.

Where one of the spouses is in peaceful and undisturbed possession of the matrimonial home and the other spouse, taking the law into her hands, unlawfully deprives him or her of such possession, the former may successfully apply for a *mandament van spolie*. See *Prof. Hahlo in the book The South African Law of Husband and Wife 5th Ed* 144, *Oglodzinski* v *Oglodzinski* 1976 (4) SA 273 (D).

Again applicant need not prove exclusive possession since co-possession is possible. See Silberberg and Schoeman's *The Law of Property (1992 Butterworth South Africa)*. 135.

Now I turn to deal with those specific issues that are at the centre of this case, the properties and the custody of the minor children of the marriage. In doing so I take heed of the command in section 46(2) of the Constitution which states that when interpreting any legislation, and developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Declaration of Rights. The court must promote the values and principles that underlie a democratic society based on openness, justice,

human dignity, equality and freedom. These values are the supremacy of the Constitution; the rule of law; fundamental human rights and freedoms; recognition of the equality of all human beings; gender equality and good governance. These principles and values sit in my mind as I work on this matter, because in my view section 46 (2) requires that the Declaration of Rights must be applied indirectly where it cannot be applied directly.

Stand number 614 Nick Price Drive, Borrowdale Brooke, Borrowdale, Harare.

To ascertain whether spoliation has occurred, it is irrelevant in this inquiry in whose name the property registered. See *Nienaber* v *Stuckey* 1946 AD 1049 @ 1053-4. The fact applicant was in prison from the 14 December 2019 to 6 January 2020 does not take away the fact that she was on the 6th January unlawfully dispossessed of the property. It is not necessary for the applicant to show continuous physical presence at the property. As long as she proves intention of securing a benefit from the property, it is sufficient. ADAM J in *Davis* v *Davis* 1990 (2) ZLR 136 (H) quoted with approval the observations of ADDELSON J in *Bennett Pringle (Pty) Ltd* v *Adelaide Municipality* 1977 (1) SA 230(E) that:

> "In terms of all the authorities cited, the 'possession', in order to be protected by a *spoliatory* remedy, must still consist of the *animus* - the 'intention of securing some benefit to' the possessor; and of *detentio*, namely the 'holding' itself . . . If one has regard to the purpose of this possessory remedy, namely to prevent persons taking the law into their own hands, it is my view that a spoliation order is available at least to any person who is (a) making physical use of property to the extent that he derives a benefit from such use; (b) Intends by such use to secure the benefit to himself; and (c) is deprived of such use and benefit by a third person."

It is apparent from the definition of possession that the mental element is met once the possessor intends to derive some benefit from his possession. Applicant was arrested from the property on the 14 December 2019, returned to the property of the 6 January 2020. This is sufficient to prove possession protected by the remedy of spoliation. My view is that an act of spoliation was committed against applicant on the 6 January 2020, when she was denied or refused entry into the property.

Respondent has no defence to this act of spoliation. The property might be registered in his name, it might be of sentimental value to him, and he might have no other home, however all these do not amount to a defence in a case of spoliation. *Mandament van spolie* is a possessory remedy. Ownership does not come into the enquiry.

Further, respondent has another challenge. I have outlined above, quoting respondent's opposing affidavit, the reasons why it is argued applicant can no longer stay at the property.

Whatever the reasons are, I do not agree that a spouse may be removed from the matrimonial home outside the parameters of the law. To my mind, she may move out of such a home either by her consent or after the conclusion of due process. She cannot be refused entrance to the matrimonial home by the members of the military. In fact, it unacceptable and anathema to the constitutional values of this jurisdiction that the military may be used to settle a matrimonial dispute. This is frightening and undermines the values inherent in our Constitution, which are the rule of law, supremacy of the Constitution, gender equality, fundamental human rights and freedoms and good governance.

Section 74 of the Constitution provides that no person may be evicted from their home without an order of court made after considering all the relevant circumstances. What happened to applicant is eviction as envisaged in section 74 of the Constitution. She was unlawfully refused access to the matrimonial home. What happed to applicant must be a cause of fear and concern to all law abiding citizens, where ever they are and their station life. It is in such situations, that this court must step in, without fear or favour, to defend the Constitution and to defend the rule of law. There cannot be in a constitutional democracy a law for the powerful and a law for the weak. It is in such instances that this court must come to the rescue of the weak and down trodden. It is in such instances that this court must stand firm and apply the law without fear or favour.

I find that applicant has discharged the *onus* on her of showing, on a balance of probabilities, that an act of spoliation was committed against her in respect of number 614 Nick Price Drive, Borrowdale Brooke, Borrowdale, Harare. She has shown a real right, entitling her to a final order of spoliation.

Custody of the minor children

Mr *Uriri* argued that the applicable section is section 5 (2) Guardianship of Minors Act [*Chapter 5:08*] which says where the mother of a minor has the sole custody of that minor in terms of section subsection 1and the father or some other person removes the minor from the custody of the mother or otherwise denies the mother the custody of that minor; the mother may apply to a children's court for an order declaring that she has the sole custody of that minor in terms of section 5 (1) and, upon such application, the children's court may make an order declaring that the mother has the sole custody of that minor and, if necessary, directing the father or, as the case may be, the other person to return that minor to the custody of the mother.

It is argued that the respondent had assumed custody of the minor children by reason of applicants arrest and incarceration. The argument goes that, if she was aggrieved by the loss of custody, she had to approach the children's court in terms of section 2. I do not agree.

My view is that the applicable section is section 5 (1) of the Act. Section 5 (1) of the Guardianship of Minors Act says where either of the parents of a minor leaves the other and such parents commence to live apart, the mother of that minor shall have the sole custody of that minor until an order regulating the custody of that minor is made under section *four* or this section or by a superior court such as is referred to in subparagraph (ii) of paragraph (a) of subsection (7).

My humble view is that the operative date is the 6 January 2020. This is the day applicant was admitted to bail. Prior to her arrest she was residing at number 614 Nick Price Drive, Borrowdale Brooke, Borrowdale, Harare with the minor children. At that point, although respondent since his return from China was not staying at the matrimonial home, the parties were still technically leaving together as husband and wife. The separation occurred on the 6 January when applicant was refused entry to the matrimonial home, refused access and custody of the children, she should have on that day, by operation of section 5 (1) of the Guardianship of Minors Act been allowed to take custody of the children. In the reading of section 5, the parents commenced to live apart on the 6 January 2020.

Respondent raises a plethora of reasons upon which he anchors his contention that it is not in the best interests of the children that their custody be awarded to the applicant. This court is not, at this stage inquiring as to which of the parents should have custody of the children. Applicant is invoking section 5 (1) of the Guardianship of Minors Act. Applicant being the mother of the children, her right to the sole custody of the children cannot be defeated, delayed or postponed. See *Mutetwa* v *Mutetwa* 1993 (1) ZLR 176 (H).

My view is that by operation of section 5 (1) of the Guardianship of Minors Act, at this point in time the children must be in the custody of the applicant. This does not mean that the door is closed against the respondent. He may, like any father in his situation approach the court for whatever relief he might well be advised to seek. However, what he cannot do, is to deny applicant custody of the children in contravention of section 5 (1) of the Guardianship of Minors Act.

For the purposes of completeness, respondent raises a handful of reasons why he must have custody of the children. Applicant disputes the allegations made by the respondent. There is a material dispute of fact rising from the versions of the parties in respect each's suitable to

have the custody of the children. The versions are mutually destructive. These versions cannot be resolved in application proceedings. In favour of applicant she has been with the children when respondent was overseas for medical purposes. Therefore, at this stage, I will not delve into the merits of the matter, however, will invoke section 5 (1) of the Act, and restore the custody of the children to the applicant. An order in terms of section 5 of the Act, cannot be interim. It is a final order.

Orchid Gardens

Applicant contends that on the 8 January 2020, she attended at Orchid Gardens, a business premise that she says she founded and owns. She alleges that she was refused access to the business premises by members of the military. In answer to this allegation, respondent says and I quote, "I have stated that premises owned by senior authorities are guarded as per law. I own the property. An abuse of power would have precluded me to even propose a sharing of same with applicant, but in the summons issued through my lawyers I have indicated how to distribute same though applicant never contributed to its purchase." The summons respondent is referring to, relates to a matter pending under cover of case number HC 9837/19. Therein applicant proposes the sharing of the immovable property acquired during the subsistence of the customary union in equal shares of 50% each, the property being Orchil Farm, Domboshawa Road, Harare.

I repeat, in an application for spoliation rights in the property are irrelevant. It is immaterial as to who owns the property. The inquiry is not about ownership, but possession. Whether applicant or respondent owns the property is not factor to be taken into account in this inquiry.

It is not disputed that the guards refused applicant access to the property. Respondent accepts this fact. Applicant as a spouse co-possesses such matrimonial assets. Applicant need not prove exclusive possession since co-possession is possible. See *Silberberg and Schoeman's The Law of Property (1992 Butterworth South Africa).* 135. I find that applicant was in peaceful and undisturbed possession of the Orchid Gardens on the 8th January 2020, and she was unlawfully disposed and without her consent.

Further, how can a spouse be refused entry into the matrimonial property. It is accepted that by virtue of respondent being a senior authority in the Republic, the property needs to be guarded. I agree. But the security personal are not guarding the property against a spouse. I see no basis on which the guards would refuse a spouse to access and enjoy the use of a matrimonial

asset. The guards must keep to their lane. And respondent if he does not want applicant to access the property, like any other person, he must deploy due process of law. Not to take the law into his own hands. I repeat, such conduct is anathema to the rule of law. The court must defend the law and the Constitution of the Republic.

Applicant, is in my humble view, on the factual matrix of this case is entitled to final order of spoliation in respect thereof Orchil Farm, Domboshawa Road, Harare.

Motor vehicles and other goods

Applicant seeks an order to allow her access and use of the motor vehicles, namely a Toyota Lexus, Mercedes Benz S400, Mercedes Benz E350 (Black), and Mercedes Benz. She says in her founding affidavit that her motor vehicles and other personal goods and effects are at number 614 Nick Price Drive, Borrowdale Brooke, Borrowdale, Harare. In answer to this allegation respondent says and I quote "what she mentioned are State cars some of which she may have used because of her proximity to me which rights are now withdrawn." He further says applicant does not state how she acquired and came to own six vehicles belonging to the State, some of which were his package when he left the Army to enter political office.

This is an application for spoliation. I am not required to determine who owns the vehicles. All I am required at this stage is to determine whether an act of spoliation has been committed in respect of the vehicles. My humble view is that on the 6th January the parties were in joint possession of the motor vehicles. They were living in matrimony. The fact that applicant was in prison from the 14 December 2019 to 6 January 2020 is irrelevant to this consideration. None of them can access and use the vehicles to the exclusion of the other without following due process. Those are the fruits of matrimony. That is what staying together as husband and wife entails. My view is that respondent cannot arbitrarily stop the applicant from accessing and using vehicles at the matrimonial home. By refusing applicant access to the vehicles, respondent has committed an act of spoliation.

This goes for everything in the matrimonial home. Except of course for those items which by their very nature and description are for the use of one spouse to the total exclusion of the other spouse.

In respect of clothing, respondent say "clothing can be given to her." He is correct. There would be no basis for applicant to be refused access to her personal clothing. Applicant is entitled to her personal clothing.

I need to briefly deal with the point raised by the respondent that all premises belonging to the members of the Presidium are protected or secured as per law to avoid destruction or intruders. It is said that those who protect such premises get orders from their superious in their line of command. My view is that it is the duty of the respondent to alert those commanders of his legal obligations in respect of his spouse. This cannot be a defence for respondent.

Other properties

Applicant also claims the return of her two safes, she says these contains her personal items taken out of the matrimonial home and allegedly given to the respondent's legal practitioners to keep in trust. There is no evidence to prove this allegation. In fact it is denied by *Mambo Nyeperayi,* an Accountant at respondent's legal practitioners. Further applicant claims the return of all furniture, goods and effects allegedly removed from the business premises known as Orchid Gardens. I am unable, on these papers before me to find for applicant in respect of these two issues. The orders sought in respect of the safes and property allegedly removed from Orchid Gardens are refused.

Draft order

This is a spoliation application. Applicant seeks an interim relief. Mr. *Uriri* argued that it is incompetent to seek an interim relief in a spoliation application. See *Blue Ranges Estates (Pvt) Ltd* v *Muduvuri & Another* 2009 (1) ZLR 368. I do not agree that this renders the application fatally defective.

A draft order is what it is, a draft order. A court is not bound by the order as presented in the draft. In terms of rule 240 of the High Court Rules, 1971 (Rules) at the conclusion of the hearing or thereafter the court may refuse the application or may grant the order applied for, or any variation of such order or provisional order, whether or not general or other relief has been asked for. I therefore do not agree that the draft order is fatally defective. The court is at large to grant the order that speaks, answers and resonates with the cause of action, the evidence on record and the justice of the case.

This is an application for spoliation. Applicant had to prove three requirements. The first is that she was in peaceful and undisturbed possession of the property until the 6 January 2020. The second is that respondent deprived her of such possession unlawfully, without due legal process and without her consent. The third is that she is entitled to be restored to the possession of the property. All these facts in issue have to be determined in favour of the

applicant for her to succeed in this application. I am satisfied, that on the evidence before me, applicant has proved the three requirements in issue. Applicant has established a clear right to be restored possession of the property she is claiming. A spoliation order cannot be granted on the evidence of a *prima facie* right. See *Blue Rangers Estates (Pvt) Ltd* v *Muduviri & Anor* 2009 (1) ZLR 368 (S).

No useful purpose would be served by granting a provisional order. Rule 240 of the Rules grants me authority to grant the order applied for, or variation of such order and even grant relief that has not been asked for, as long as it speaks, answers and resonates with the cause of action, evidence on record and the justice of the case.

Further this court is constitutionally enjoined to regulate its own processes. The empowering provision is section 176 of the Constitution of Zimbabwe Amendment (No. 20) Act 2013, which provides as follows:

> *The Constitutional Court, the Supreme Court and the High Court have inherent power to protect and regulate their own process and to develop the common law or the customary law, taking into account the interests of justice and the provisions of this Constitution.*

This court cannot with its eyes open grant an incompetent order. The court has rule 240 Rules and section 176 of the Constitution to deploy. This court has a right to regulate its process, to me granting an order that answers and resonates with the cause of action, the evidence before court and justice of the case, is the text book case of a court regulating its process. I am satisfied that on the evidence on record, applicant has made a good case for a final order of spoliation.

The court must do justice between litigants, and to achieve this objective it must not allow itself to be swayed by technical objections and failures which do not go to the root of the matter.

The rule of law

Applicants papers are laden with an allegation that respondent, by virtue of his senior public office, is abusing his State power. The complaint is that respondent is using State power only available to him by virtue of his high office, which power is not available to her (applicant).

It is significant to make the point that one of the crucial elements of the Constitution of Zimbabwe Amendment (No.20) Act 2013 (Constitution), is to make a decisive break from the normalisation of abuse of State power that preceded this Constitution. To achieve this goal, the

principles of accountability, the rule of law and the supremacy of the Constitution have been constitutionalised. These values are now foundational to our constitutional democracy. In terms of the rule of law, government and its officials and agents as well as individuals and private persons are accountable under the same law.

The rule of law expresses the principle that all people are equal under the law. No one is above the law, and no one is below it. The courts exist to ensure that everyone is accountable to the law. The role of courts is to protect the rights and freedoms guaranteed under the Constitution.

Where an individual can show that his or her rights have been violated, the courts will provide a remedy. Everyone, whatever his or her rank, is subject to the law. In the words of *Albert Dicey*, "with us every official, from the prime minister down to a constable or a collector of taxes, is under the same responsibility for every act done without legal justification as any other citizen." Our constitution demands no less.

In his opposing affidavit respondent makes the point that he is responding to the application like any other citizen and he acknowledges that he is subject to the laws of Zimbabwe. This is exactly how it is and how it should be. Zimbabwe is a young constitutional democracy still finding its way to full compliance with the values and ideals enshrined in the Constitution.

A court can only interpret the law, and apply it to the facts before it and no more. Failure to do so would amount to an abdication of the court's constitutional obligation.

Let the rule of law reign supreme.

Disposition

In *Blue Rangers Estates (Pvt) Ltd* v *Muduviri & Anor* (*supra*) the Supreme Court of this jurisdiction stated that a spoliation order cannot be granted on the evidence of a *prima facie* right. The *onus* lies on the applicant to establish on a balance of probabilities that she has been despoiled. In my view, applicant has succeeded to establish on a balance of probabilities that indeed she has been despoiled. In the result, I order as follows:

1. The respondent is hereby ordered to restore the custody of the minor children, namely *Tendai Dominique Chiwenga* (Born 4 November 2011), *Christian Tawanazororo Chiwenga* (Born 15 November 2012), and Michael *Alexander*

Tadisiswa Chiwenga (Born 13 February 2014) to the custody of the applicant within twenty-four hours of this order.

2. The respondent is hereby interdicted and restrained from interfering with applicant's access to, use and enjoyment of the property known as 614 Nick Price Drive, Borrowdale Brooke, Borrowdale, Harare.

3. The respondent is hereby interdicted and restrained from interfering with applicant's access to, use and enjoyment of the property known as Orchid Gardens, Domboshawa, Harare.

4. The respondent is hereby interdicted and restrained from interfering with applicant's access to, use and enjoyment of the motor vehicles, namely Toyota Lexus, Mercedes Benz S400, Mercedes Benz E350 (Black).

5. Respondent is interdicted and restrained from denying or refusing applicant access and /or possession of her clothing.

6. The respondent is ordered to pay applicant's costs of suit.

Mtetwa & Nyambirai, applicant's legal practitioners
Manase and Manase, respondent's legal practitioners