

LAWRENCE MAHARA  
versus  
OFFICER IN CHARGE, VEHICLE THEFT SQUAD (N.O)  
and  
NATIONAL PROSECUTING AUTHORITY  
and  
EDITH MAHACHI  
and  
TIRIVANHUTOSE CHISAMBIRO  
and  
ADAM NYARIRA  
and  
MUNYARADZI MUTANHAURWA  
and  
JULIUS TAVISON RUGUCHU

HIGH COURT OF ZIMBABWE  
**CHIKOWERO J**  
HARARE; 9 May 2024 and 28 August 2024

***Opposed application***

*J Mapuranga*, for the applicant  
*M Ngwenya*, for the 3<sup>rd</sup> respondent  
*V Chivore*, for the 4<sup>th</sup> respondent  
*F Nyamayaro*, for the 7<sup>th</sup> respondent  
No appearance for the 1<sup>st</sup>, 2<sup>nd</sup>, 5<sup>th</sup> and 6<sup>th</sup> respondents

CHIKOWERO J:

- 1) Despite the painstaking efforts of Mr *Mapuranga* to persuade me to find otherwise, I am satisfied that this is in substance not an application for a declaratory order. I agree with Messrs *Ngwenya*, *Chivore* and *Nyamayaro* that this is a criminal matter disguised as an application for a declaratory order. It is dismissed with costs on the legal practitioner and client scale because it is an unmitigated abuse of court process.
- 2) The applicant is in the business of importing motor vehicles from South Africa and selling them in Zimbabwe. The car sales enterprise runs under the style “Avid Auto”.
- 3) In or about February 2023 the applicant imported two Toyota Hiluxes, a Fortuner GD6, a Chevrolet Trailblazer and a Mercedes Benz.
- 4) He handed over all five motor vehicles to Tatenda Dexter Musarurwa and Takudzwa Michael Ngandu. The applicant says he was in the company of his brother, one Nyasha

Mahara, when all this happened. Nyasha has deposed to a supporting affidavit in this regard.

- 5) According to the applicant, Musarurwa and Ngandu were only authorised, by him, to advertise or market the vehicles. Once they secured a prospective purchaser, they were required to contact either the applicant or Nyasha who would conduct the actual sale of the motor vehicle concerned. Musarurwa and Nyasha's reward would be what the applicant described as a "mark up". This would be the difference between the purchase price as set by the applicant and the slightly higher amount advertised by them as the purchase price. In short, Musarurwa and Ngandu would pocket anything in excess of the actual selling price of each vehicle.
- 6) The applicant says Musarurwa and Ngandu (herein after, where convenient, referred to as "the duo") were not employees of his. But he tells me that he had worked with them in the manner that I have set out for more than ten years.
- 7) It transpired that the duo, between them, sold the five motor vehicles, at the rate of one motor vehicle apiece, to the third, fourth, fifth, sixth and seventh respondents.
- 8) I think it useful to allow the applicant to speak through paragraphs 32 to 36 of his founding affidavit:

"32. I did not pass transfer of my vehicles... to any of the respondents who were found in possession of my cars. I did not sell the vehicles to them nor did I authorize Musarurwa and Ngandu to dispose of my vehicles. Their job was confined to marketing the vehicle and finding buyers. Had I wanted them to sell, I would have given them a signed mandate form that I use when giving mandates to sell.

33. The sale of my vehicles by Musarurwa was done fraudulently and without my knowledge or consent. I am advised by Counsel which advice I accept that Musarurwa and Ngandu could not pass rights which they did not have to the third to seventh respondents. In the circumstances I will move the court to nullify the purported agreements of sale.

34. The vehicles are currently in first respondent's possession. They were seized from third to seventh respondent pursuant to a report which I made. Currently there are no ongoing court proceedings instituted by second respondent because the accused persons are yet to be accounted for and may never be accounted for at all given that they have fled the country. The proceedings may never be instituted as long the accused persons are outside the country.

35. The vehicles are parked and exposed to direct wind and sun and consequently they are depreciating on a daily basis due to weather. There is a real risk of the vehicle's accessories being stolen whilst in the police yard. I therefore implore the Honourable Court to direct that the vehicles be returned to my possession.

36. I believe there would be no prejudice that will be occasioned to first and second respondent if the vehicles were to be released to me given that I am the owner of the vehicles and I am the aggrieved party. In the event that they are needed as exhibits. I undertake to avail the vehicles to first and second respondent." (the underlining is mine for emphasis)

9) The draft order, in relevant part, reads as follows:

“WHEREIN after reading documents filed of record and hearing Counsel(s) it is ordered that:

1. The applicant be and is hereby declared the lawful and rightful holder of rights in the following vehicles:
  - (a) Toyota Fortuner Engine number – IGD0591645 [vehicle identification number AHT] A3GS900233663.
  - (b) .....
  - (c) Toyota Hilux chassis number – AHTKB3CB702364084, Engine number 2GDC397692.
  - (d) Mercedes Benz, chassis number – WDD2050402R001054, Engine number 27491030183238.
  - (e) .....
2. Any agreements of sale purporting to give the third to seventh respondent rights over the respective vehicles listed in clause 1 above are hereby declared null and void.
3. The first respondent be and is hereby directed to surrender possession of the vehicles listed in clause 1 to the applicant within 48 hours of being served with this court order.
4. In the event of first respondent’s failing to comply with clause 4 above, The Sheriff is ordered to recover the said motor vehicles from wherever and from whomsoever they are found and deliver them to applicant.
5. The applicant be and is hereby directed to keep the vehicle in his possession and avail them to first respondent upon demand in the event that they are needed as exhibits.
6. The third to seventh respondents shall bear the costs of suit at higher scale”

10) Mr *Mapuranga* indicated at the hearing that the fifth and sixth respondents had not opposed the applicant and that default judgment had since been granted against them. Consequently, they had fallen out of the picture.

11) The third, fourth and seventh respondents opposed the application. They relied on preliminary points as well as adverting to the merits of the matter. Because of the view that I take of the matter it is unnecessary to relate to most of those preliminary points. By the same token I shall not determine the matter on the merits seeing as it is not a civil matter at all. It is not an application for a declaratory order. It is not the kind of matter provided for in s 14 of the High Court Act [*Chapter 7:06*].

12) The sale of the vehicles in question by Musarurwa and Ngandu triggered the applicant’s resort to the criminal justice system. It seems to me that he understood that the two had committed a crime by the very act of selling the vehicles in question. The founding affidavit suggests that the report he made to the police was that the two had fraudulently sold his vehicles because they had no authority to sell. I am aware that the third, fourth and seventh respondents are adamant that Musarurwa and Ngandu committed no crime. They say the two were either the applicant’s employees or agents for purposes of selling the vehicles. They place reliance partly on the fact that the sellers were in possession of the original documents. Those documents were handed up to the three on conclusion of

the sales, and the purchase prices paid. The sellers delivered the motor vehicles to the respondents which would facilitate acquisition of the motor vehicles by the three respondents. See *Principles of the Law of Sale and Lease*, 3<sup>rd</sup> Ed by G Bradfield and K Lehmann at p71. I prefer to leave the resolution of the dispute on whether Musarurwa and Ngandu committed a crime, including identifying that crime, if any, to the criminal justice system. Similarly, that system will determine whether the three respondents lawfully acquired the concerned motor vehicles. It will decide whether to return the vehicles to the three respondents or to the applicant.

- 13) It will be recalled that the applicant himself, prior to instituting what he has called an application for a declaratory order, had already filed a police report against Musarurwa and Ngandu. In his founding affidavit he repeatedly referred to the two as accused persons. In investigating the report that he had filed, the police seized the motor vehicles in question from the third, fourth and seventh respondents. The wheels of the criminal justice system had been put into motion by the applicant himself.
- 14) The vehicles are being kept by the police's vehicle theft squad because they are articles concerned in what appeared to the police to have been the commission of a crime. When a person reports a matter to the police, he or she must be prepared to let the criminal law take its course. The complainant in that matter is not the applicant. It is the State. I have no doubt that the applicant is fully aware that he has placed a criminal case before me disguised as a civil matter, namely an application for a declaratory order. He has dragged the National Prosecuting Authority to this Court. S 258 of the Constitution reads as follows:

“258 Establishment and functions of the National Prosecuting Authority

There is a National Prosecuting Authority which is responsible for instituting and undertaking criminal prosecutions on behalf of the State and discharging any functions that are necessary or incidental to such prosecutions.”

The only reason why the second respondent was cited as the National Prosecuting Authority and not the State was to disguise the nature of the application. The moment that the second respondent would have been cited as the State it would have been obvious to all and sundry that the application placed before this court was criminal in substance, and not that which it purports to be. That which the applicant has done is an abuse of court process.

- 15) The applicant cannot be allowed to circumvent the processes involved in a criminal matter, for whatever reason, by giving such matter a false name and identity just to lay

his hands on the three motor vehicles. It will be noted that he had a difficult time trying to conceal the substance of the application. He asks this Court, exercising civil jurisdiction, to speak to processes in a criminal matter. The applicant wants this Court to interfere with and preempt the outcome of a criminal investigation and possible trial by ordering the overall head of the police team investigating the matter (the first respondent) to release motor vehicles which may very well still be needed as exhibits. The undertaking made by the applicant in paragraph 5 of the draft order (captured at paragraph 9 of this judgment) demonstrates the applicant's awareness of the substance of his application.

16) In *Chiwundo v Zimbabwe National Family Planning Council* HH 212/13 MATHONSI J (as he then was) said at p4 of the cyclostyled judgement:

“It is now fashionable for litigants who find themselves hamstrung in the labour dispute resolution structures of our justice system for one reason or the other, to fall back on this Court under the guise of seeking a declarator. While it is true that this Court has, at its discretion, authority and power bestowed upon it by s 14 of the High Court Act, to enquire into and determine any existing, future or contingent right or obligation, and that an interested party can approach the Court for a declaration of its rights *Musara v Zinatha* 1992 (1) ZLR 91(H), there is no magic in the remedy of a declaratory order and this Court will not easily jump to exercise its discretion where clearly the applicant had other remedies available to her which she spurned out of tardiness or poor legal advice.”

17) HIS LORDSHIP continued at p5:

“Indeed, the substance of this application has nothing to do with a declarator. ... A Court of law should not be deceived by the form of the application, it will put aside the veil and examine its true nature and substance: *Kilburn v Estate Kilburn* 1931 AD 501 at 507.

.... No amount of flummery with the form of the application and the phrase “declaratory order” will change the complexion of this matter in substance. It remains a labour dispute which should be determined by the Labour Court.”

See also *Chawora v Reserve Bank of Zimbabwe* 2006(1) ZLR 252(H). In *Chiwundo* (*supra*) the Court found that what was placed before it was a labour matter disguised as an application for a declarator. The same finding was made in *Chawora* (*supra*). I have examined the application placed before me and am satisfied that it is a criminal matter. All that the applicant wants is to get the vehicles back without going through the dispute resolution structures of our criminal justice system. He deliberately decided against citing Musarurwa and Ngandu as respondents despite the entire application being based on the fraud that he alleged was perpetrated by them. If he had cited them, he would

have been forced to describe them as accused persons. That would have exposed the substance of the application as being that which I have found it to be.

18) I mark my disapproval of the applicant's abuse of Court process by ordering him to pay the third, fourth, and seventh respondents' costs on the punitive scale. They incurred unnecessary legal costs by being called upon to defend the application. The application should never have been filed. I agree with Messrs Ngwenya, Chivore and Nyamayaro's submissions in this regard.

19) In the result, IT IS ORDERED THAT:

1. The application be and is dismissed.
2. The applicant shall pay the third, fourth and seventh respondents' costs on the legal practitioner and client scale.

**CHIKOWERO J:** .....

*M D Hungwe Attorneys At Law, applicant's legal practitioners*  
*Chimuka Mafunga Commercial Attorneys, 3<sup>rd</sup> respondent's legal practitioners*  
*Chivore Dzingirai Group of Lawyers, 4<sup>th</sup> respondent's legal practitioners*  
*Farai Nyamayaro Law Chambers, 7<sup>th</sup> respondent's legal practitioners*