JOHANES FAURIE
versus
ANDREW MACHIHA

HIGH COURT OF ZIMBABWE
MTSHIYA J
HARARE, 24 October, 2013 and 18 December, 2013

P. Sosono, for the applicant
O. Mushuna, for the 2nd respondent

MTSHIYA J**:** On 15 March 2012 this court issued a Provisional Order whose terms were as follows:

> "TERMS OF FINAL ORDER SOUGHT
>
> That you show cause to this Honourable Court why a final order should not be made in the following terms:-
>
> 1. Why Respondents should not lease one Isuzu vehicle registration AAP 0463 to applicant forthwith as per written agreement.
> 2. Costs incurred in recovering the said vehicle shall be borne by Respondent.
> 3. The costs of this application to be borne by the Respondent.
>
> ITERIM RELIEF GRANTED
>
> Pending the return date:
>
> 1. This order compels the Respondent to release vehicle AAP 0463 Isuzu to Applicant forthwith.
> 2. If the Respondent fails to release the said vehicle after service of this order, the Deputy Sheriff/Messenger of Court is directed to recover the vehicle from him and deliver same to the applicant."

The vehicle referred to in this provisional order had been given to the applicant as security for a loan of US$ 8000-00 he had granted to the respondent. That was not disputed by the first respondent who did not oppose this application.

On 16 May 2012 this court granted the following order in favour of the second respondent:

"IT IS ORDERED THAT

a) The applicant be and is hereby, joined as a party in the proceedings instituted by the first Respondent against the second respondent under Case Number HC 2975/12. The Applicant is joined thereto as the second Respondent.

b) The Applicant shall file his opposing papers in Case Number HC 2975/12 within ten (10) days of the date of this order.

c) Costs shall be in the cause."

Indeed on 31 May 2012 the second respondent filed his opposing affidavit. He did not dispute the arrangements between the applicant and the first respondent relating to the loan and the security thereof. He, however, claimed that, prior to this court's provisional order of 15 March 2012, the first respondent had, on 21 March 2011, sold to him the vehicle in question and the vehicle was then registered in his name.

The respondent said he had been in possession of the vehicle from 21 March 2011 until mid April 2012 when it was seized from his custody by the Deputy Sheriff on the basis of the provisional order granted in favour of the applicant on 15 March 2012. He then went further to state that:-

"4.10 The 1st Respondent also informed me that before he sold the vehicle to me, he never informed the Applicant. He only informed the Applicant after the vehicle was sold which prompted the Applicant to demand that the 1st Respondent sign an acknowledgement of debt in the aforesaid sum of US$ 8000-00, which the 1st Respondent duly signed on the 4th of July 2011. I refer in this regard to the acknowledgement of debt which is Annexure "A" to the Applicant's founding affidavit. The said Annexure was duly witnessed by the Applicant who appended his signature thereon and stamped the document with a stamp bearing his name and residential address as appears *ex facie* the document.

4.11 In the premises, I therefore dispute the allegations that the Applicant released the vehicle to the 1st Respondent at the end of February 2012. The Applicant deposed to downright falsehoods on that aspect not only because the Applicant has never had possession of the vehicle at all material times hereto, but more remarkably so because from 21st of March up until mid April 2012, I have had sole custody and possession of the Isuzu vehicle. It is axiomatic that the Applicant could not have released to the 1st Respondent a vehicle he did not possess in the first place.

4.12 The alleged possession is non-existent and was only pleaded by the Applicant in order to pull the wool over this Honourable Court's eyes with a view of securing a spoliation order by deceitful means. In any event, the circumstances under which the provisional order was granted are difficult to understand as there is no

evidence on record that an urgent chamber application which was filed on 15th of March 2012 was served on the1st Respondent who lives in Chinhoyi before the matter was set down for hearing and the provisional order granted on the same day. No proof of service was found on my attorneys of record.

4.13 But even accepting for a moment that the Applicant had possession of the vehicle at the end of February 2012 and that 1st Respondent requested Applicant to release it back to him (1st Respondent) for his use, as alleged, it therefore means that the Applicant voluntarily released the vehicle to the 1st Respondent for his use and there was therefore no legal basis established for the grant of a spoliation order. .....

7. In the premises, the provisional order granted on the 15th of March 2012 ought to be discharged with costs on that scale applicable as between attorney and own client and against both the Applicant and 1st respondent, jointly and severally, the one paying and the other to be absolved, on the grounds that the Applicant deposed to downright falsehoods in his founding affidavit in order to mislead this Honourable Court into issuing the provisional order while 1st Respondent behaved despicably and deceitfully by selling me a vehicle which he had pledged as security in favour of the Applicant without disclosing that fact to me. Now as a result of both the Applicant's and the 1st Respondent's wrongful and deceitful conduct, I have been put to expense unnecessarily by firstly, making an application for joinder, filing an urgent chamber application and then opposing the proceedings in order to secure my rights as interest in the vehicle issue. Costs in case number HC 3605/12 being costs in the cause, I humbly aver that it is just and equitable that the Applicant and the 1st Respondent pay cost in case number HC3605/12 on a punitive scale for reasons already given, that is Jointly and severally the one paying the other to be absolved.

In response to the above arguments, the applicant made some of the following observations:

"2. It is common cause and not in dispute that applicant loaned and advanced the sum of US 8000-00 (Eight thousand United States Dollars) to the first respondent sometime in 2010 and as surety the vehicle in question was surrendered. 1st respondent is not disputing. 2nd Respondent is in fact shooting himself in the foot by stating that he was told and warned of the dilemma ahead.

3. Basing on this alone it is submitted that 2nd Respondent took risk on his own to enter into agreement by the 1st Respondent knowing very well that the car was under surety of another older deal by applicant and 1st respondent.

4. In essence what is being sought by 2nd Respondent herein is to bar 1st Respondent from executing effectively the deal which they entered into by applicant yet he has no legal base and *locus standi* whatsoever to do so.

5. There are many alternative remedies which 2nd Respondent can always resort to because 1st respondent is the one who took the money from the 2nd Respondent and he is there, his address is known and otherwise not disputing the transaction thereof, I submit is proper, otherwise and effective to sue and recover from 1st Respondent instead of bothering the applicant."

Notwithstanding the joinder, I have not been able to understand why the second respondent should not have filed an interpleader since the vehicle is registered in his name. It is not in dispute that the vehicle claimed by the second respondent is the same vehicle that was surrendered as surety for the loan. On the basis of what the applicant referred to as "fraudulent taking", the vehicle was repossessed by the first respondent and was only returned to the applicant through this court's provisional order of 15 March 2012- which provisional order the applicant seeks to have confirmed.

I also want to state that it is not for the second respondent to argue that the applicant was never dispoiled. The first respondent has not opposed the confirmation of the provisional order. The reason why the first respondent was able to surrender, as security, the vehicle, allegedly belonging to the second respondent, remains a matter between the respondents themselves. That issue has nothing to do with the applicant. That being the case and with the first respondent having not opposed this application, I find it difficult to give any blessing to the second respondent's prayer.

As submitted by the applicant, I fully agree that the correct procedure to adopt was for the second respondent to file an interpleader application. He should have challenged the seizure of his property under the provisional order through an interpleader. That he did not do and his counsel conceded to that point.

My view is that, there is nothing before the court to disprove that the applicant was despoiled and hence the granting of the provisional order. The despoiler (first respondent) has not opposed the confirmation of this order. I therefore do not think that it is for this court to delve into how the applicant had, in the first place, obtained possession of the vehicle when it did not belong to the first respondent.

The absence of opposition from the first respondent confirms that;

a) the applicant was in peaceful and undisturbed possession of the motor vehicle and;

b) the applicant was forcibly and wrongfully deprived of possession of the vehicle without his proper consent. The vehicle was fraudulently taken away from him. (See *Botha & Anor v Barrett* 1966 (2) ZLR73 (5)). That aspect cannot be for argument by the second respondent. It is only the first respondent who can be heard on that aspect.

In view of the foregoing, my finding is that there is nothing militating against the confirmation of the provisional order.

It is ordered THAT:

1. The Provisional Order of 15 March 2012 be and is hereby confirmed; and
2. The respondents shall pay costs of suit.

Messers Sosono and Partners, applicant's legal practitioners
Messers Mushuma Law Chambers, 2nd respondent's legal practitioners