

SHEPHERD TUNDIYA

Versus

DETECTIVE CONSTABLE NDAHWI

AND

OFFICER IN CHARGE CID GWERU

AND

CHIEF SUPERITENDENT CHAKABVA

AND

COMMISSIONER GENERAL OF POLICE (N.O)

AND

THE SHERIFF OF THE HIGH COURT (N.O)

IN THE HIGH COURT OF ZIMBABWE

MOYO J

BULAWAYO 13 FEBRUARY & 20 FEBRUARY 2020

Urgent Chamber Application

B Balamanja, for the applicant

B.T Nyoni, for the 1st – 4th respondents

MOYO J: This is an urgent application wherein the applicant seeks the following interim relief

“That pending the determination of this application for a spoliation order, the applicant is granted the following relief:-

- 1) That pending finalization of their investigations, 1st, 2nd, 3rd and 4th respondents are hereby ordered to restore forthwith to the applicant the possession of a vehicle namely a Mercedes Benz E 300, white in color, engine number 27295231420001, chassis number WDD2120542A144646 failure of which the 5th respondent is empowered to take possession of the said vehicle and restore its possession to the applicant.

- 2) That 1st, 2nd, 3rd and 4th respondents are hereby prohibited from taking the said vehicle to South Africa or handing it over to the South African Police Services or any member thereof.”

The facts of this case are that sometime in 2017 applicant purchased the motor vehicle being the subject matter of this application from a 3rd party. It seemingly had proper papers when he bought it. He then sold it to a 3rd party and thereafter irregularities were unearthed relating to its status causing him to approach the Zimbabwe Revenue Authority (hereinafter referred to as ZIMRA) to regularize same. ZIMRA required duty together with the relevant export papers from South Africa. The duty required by ZIMRA is still outstanding to date. However, sometime in 2019 applicant obtained an order from the magistrate’s court that authorized him to collect the motor vehicle from ZIMRA.

The motor vehicle was now in applicant’s possession when the respondents seized it on 20 January 2020. It is applicant’s contention that the seizure is unlawful and a smoke screen as respondents now wanted to use the back door to lay their hands on the motor vehicle which the magistrate’s court had ordered should be returned to applicant. Applicant further alleges that the sole reason for the seizure is to return the motor vehicle to South Africa behind applicant’s back like the respondents and ZIMRA have attempted to do before.

The respondents have filed opposing papers, and deny that the seizure of the said motor vehicle is without cause as there are pending investigations in relation thereto. In paragraph 7 of the 3rd respondent’s opposing affidavit, the officer states that he was assigned to be an investigating officer in CR 19-20/01/2020 and that it was referred to the Harare Anti-Corruption Court and CRB 03/2020 was opened leading to the arrest of the magistrate who had granted applicant an order and the subsequent seizure of the motor vehicle was done by 1st respondent on 3rd respondent’s behalf. He says the motor vehicle was impounded as an exhibit in CR 19-20/01/2020 because that case involved the alleged improper release of the same motor vehicle by the magistrate. He further avers that the motor vehicle was seized in terms of section 49 of the Criminal Procedure and Evidence Act Chapter 9:07 and that all the procedures were followed. He further avers that the law is very clear that the vehicle can only be disposed of in terms of the relevant sections of the same Act. He further states that the vehicle is kept as an exhibit in Harare and is marked Exhibit 29/2020 by the CID pending the finalization of the matter in CR 19-20/01/2020.

Applicant in his answering affidavit disputes the fact that the car is the subject matter of CR 19-20/01/2020 as that case has absolutely nothing to do with his car and that in fact it relates to a different motor vehicle altogether. This raises a factual dispute on a material point that this court cannot resolve on the platform of urgency. It is also trite that where an applicant seeks relief, and the respondent comes with facts that sufficiently challenge the basis for the relief, such a factual dispute, where present, negates the applicant's case as the applicant is the one with the burden of proof on a balance of probabilities. It is the applicant who must make a case for the relief that he seeks and where respondent comes up with a strong defence, the effect of that is that applicant would have failed to make a case for the relief sought. In any event, applicant, in terms of the relief he seeks, acknowledges that there are some pending investigations as he seeks in paragraph 1 under the interim relief which I have already quoted herein, that "pending finalization of their investigations." So if there are investigations pending as acknowledged in the relief being sought, what is applicant looking for here for certainly the respondents do have the power in terms of the law to seize articles pending investigations. I cannot order that the motor vehicle be released "pending investigations" for as long as investigations are on course. The relief sought itself acknowledges pending investigations.

Applicant cannot claim to have been despoiled by a person acting in accordance with the law doing some investigations. The relief itself is incompetent as I have no power to order the release of items seized pending investigations as applicant himself seeks. Neither could applicant be despoiled in such circumstances.

I accordingly dismiss the application for the reasons stated herein, with costs.

Hlabano Law Chambers c/o Tanaka Law Chambers, applicant's legal practitioners