

**NJABULISO MAZIBUKO**

**Versus**

**J H M INVESTMENT (PVT) LTD**

**And**

**MR LUWANDA**

**And**

**MR CHIWUNDURA/CHIGUDUNRA**

**And**

**PRINCE NDLOVU**

**And**

**STYLINE PANEL BEATERS & BREAKDOWN SERVICES**

**And**

**LIZWE JAMELA N.O.**

IN THE HIGH COURT OF ZIMBABWE  
MOYO J  
BULAWAYO13 & 20 FEBRUARY 2020

**Urgent Chamber Application**

*N. Mazibuko* for the applicant  
*M. S. Gutsa* for the 1<sup>st</sup> respondent

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

“Pending the return date and subsequent finalisation of the matter, the applicant is granted the following interim relief:

- (a) The 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> respondents be and are hereby ordered, upon service of this order on them to restore the 2003 white Mazda Titan motor vehicle registration number AFB 8158 into the possession of the applicant within 2 hours of service of this order on them by the Sheriff of Zimbabwe or his deputy.
- (b) In the event that the respondents fail to restore the motor vehicle entered in (a) above to the applicant within the time period stated, through the Sheriff of Zimbabwe or his deputy anywhere in Zimbabwe be and is hereby authorized to recover the 2003 white Mazda Titan motor vehicle registration number AFB 8158 from the respondents or any other persons wheresoever situate and to restore the same to the applicant.
- (c) In the event that the 1<sup>st</sup> to 5<sup>th</sup> respondents fail to comply with paragraph (a) above, then the respondents shall be delivered to be in contempt of court and shall be liable to arrest and incarceration for as long as the motor vehicle remains undelivered to the applicant.”

The facts of this matter are that the applicant and 1<sup>st</sup> respondent are in a contractual relationship wherein the 1<sup>st</sup> respondent loaned the applicant some monies which resulted in them entering a pledgee – pledgor agreement wherein the applicant pledged his Mazda Titan motor vehicle being the subject matter of this application to the 1<sup>st</sup> respondent.

Whilst there are principles relating to such a relationship, the parties modified such principles and tailor made their agreement in a specific way. In particular that the pledgor in terms of annexure “C” paragraph 4 therein specifically stated in an affidavit as follows:

“In the event that JHM Investments (Pvt) Ltd elects me to remain in possession of these assets, I am only doing so on their behalf and I am only using these assets to the extent permitted by them, and I hereby attest that my said invitation for them to come and collect these assets still stands. In collecting these assets now, or later they therefore already have my full and irrevocable permission unless my liabilities/indebtedness to the m have been fully discharged, to take the assets without the need for them to obtain a court order to that effect which assets I give them the mandate to sell either by private treaty or by public auction, as they see fit, to settle or reduce my liabilities/indebtedness to them.”

The applicant’s case is further that the 2<sup>nd</sup> – 4<sup>th</sup> respondents’ despoiled him of his Mazda Titan motor vehicle on the 29<sup>th</sup> of January 2020 and he therefore seeks an order for restoration.

The respondents' dispute that applicant was in peaceful and undisturbed possession of the motor vehicle and that what they did was as per the agreement of the parties as evidenced by annexure "C" paragraph 4 already quoted herein.

Respondents have raised 2 points *in limine* stating that the matter is *res judicata* and that the matter is not urgent. On the point *in limine* relating to whether the matter is *res judicata*, respondents have filed copies of an *ex parte* application purportedly filed by the applicant at the Magistrates' Court being CC56/20 wherein the applicant filed the same matter before the Magistrates' Court and it was dismissed on 31 January 2020. Respondents argue that applicant cannot then approach this court with the same matter on the same basis save through an application for review of the magistrate's decision.

Applicant argues that the matter is not *res judicata*, because the *ex parte* application while filed, was never issued by the court, and therefore the magistrate erred in entertaining and dismissing it. They say the application was not court process and therefore the magistrate's actions were a nullity. They further submitted that in fact the magistrate endorsed that he also had no jurisdiction to entertain the matter as the parties chose the Magistrates' Court in Harare per their agreement.

Applicant further argues that the learned magistrate while served with the application did not respond to this application meaning that he does not oppose the averments therein. I hold the view that if the matter once came through the Magistrates' Court and was dismissed, whether, the actions of the magistrate were a nullity or not, it's not a determination I can make without the relevant certified proceedings of the Magistrates' Court. What applicant wants is for me to sit here and make factual findings on what transpired at the Magistrates' Court when I do not have the relevant tools to do so. In this instance being the court record from the court *a quo*. A proper platform for an attack on the procedural irregularities that occurred at the Magistrates' Court would be a review. It is on review that the file being referred to as having resulted in a nullity can be properly scrutinized and analysed to assist this court to make an informed decision thereto. The magistrate made a determination of the matter that applicant has brought here on the urgent route

and the same matter stands dismissed by the Magistrates' Court until that anomaly is corrected or decided upon by an appropriate court. Applicant, in my view has no right to ignore proceedings that have been dealt with by a magistrate stating that they are a nullity. They cannot be a nullity until they have been declared as such with the relevant information having been placed before this court on the appropriate platform. As matters stand, applicant did file an *ex parte* application before the Magistrates' Court and it was dismissed, whether that was correct or a nullity must be resolved on the appropriate platform which is definitely not this one. Learned magistrates rarely oppose applications for the review of their decisions because they are not interested parties *per se*. I am also not aware of a legal principle that says an application, if unopposed must always be granted against the person who does not oppose even if clearly from other factors and issues relating to procedure and the law, a case would not have been made for the relief sought. I would therefore uphold this point *in limine* as being valid.

The 2<sup>nd</sup> point *in limine* relates to urgency. The respondents' argument is that from the time the applicant signed the affidavit giving his prior consent for the possession of the motor vehicle to the respondent and that they could at any time take the motor vehicle, he divested himself of any rights to claim that he had been despoiled by the respondents since he gave the permission to collect the motor vehicle anytime and even stated that his possession was on their behalf. Respondents argue that applicant could not therefore have been in peaceful and undisturbed possession since the 15<sup>th</sup> of October 2019. Respondents also argue that the applicant gave his prior consent to the dispossession. Applicant argued that at the time respondents came for the motor vehicle, applicant had refused to hand it over to them and therefore he never gave them his consent and that in any event paragraph 4 of annexure "C" quoted herein flouts the provisions of the Consumer Protection Act Chapter 14:14. However, applicant does not dispute signing annexure "C" and he has not since 15 October 2019, sought to challenge its validity on the appropriate platform. Applicant from the 15<sup>th</sup> of October 2019, was at the mercy of the respondents' actions, meaning that he knew that clause 4 of annexure "C" was to be implemented by the respondents at any time, he sat back and did nothing when he knew that he has signed an affidavit divesting himself of possession of the motor vehicle and obviously seeing the repercussions of that clause, he did not act to resile from it. He waited until respondent's decided to act in terms of that clause.

This in my view is self created urgency. Applicant almost always knew after signing that affidavit almost 4 months ago, that such actions as have been done by the respondents were looming and he did nothing. In fact, he cannot allege that he was in peaceful and undisturbed possession at the actual time, when as a willing adult under no duress he contracted himself out of that possession. Applicant only has himself to blame. He has failed to manage his affairs prudently by entering into agreements that divest him of his rights to certain remedies, then proceeding to try and attain the same remedies that he has renounced. Clause 4 of annexure “C” is a renunciation of the possession and an acknowledgment that he was at the mercy of the respondents’ generosity. There is certainly no urgency in this matter. Applicant should live with the terms of the agreement he made and if he wishes to challenge the fairness or validity of same, that is certainly a matter for another day as he cannot seek to resile from a contract through an urgent application for a spoliation order. If he wishes to challenge the validity of that agreement, he should launch an appropriate case in that regard.

I accordingly uphold the 2<sup>nd</sup> point *in limine*. The 1<sup>st</sup> point *in limine* goes to the root of the application warranting that I dismiss it, as a result, the application is dismissed with costs.

*Calderwood, Bryce Hendrie, & Partners*, applicant’s legal practitioners  
*Gutsa & Chimhoga Attorneys c/o Mathonsi Ncube Law Chambers*, 1<sup>st</sup> respondent’s legal practitioners