MICHAEL P. HITSCHMAN

and

PESCA (PVT) LTD

versus

COMMISSIONER - GENERAL OF POLICE

and

CO-MINISTER OF HOME AFFAIRS THERESA MAKONE

and

CO-MINISTER OF HOME AFFAIRS KEMBO MOHADI

and

ATTORNEY GENERAL OF ZIMBABWE

and

SUPERINTENDENT ARNOLD ZORODZAI DHLIWAYO

HIGH COURT OF ZIMBABWE

NDEWERE J

HARARE, 21 November 2013 and 12 February 2014

**Opposed matter**

*T. Maanda*, for the applicants

Respondents in default

NDEWERE J: The applicant was arrested in March 2006 for unlawful possession of firearms. He was convicted for contravening the Public Order and Security Act [*Cap* 11:17] and sentenced. At the time of arrest, the police recovered several firearms and other property from the applicants’ premises. The recovered property was not returned to the applicants after the trial.

On 4 July, 2012, the applicants filed a court application for the return of the seized property. The applicants’ prayer was for the watch, Trace Mod S3001 B, a Hewlett Packard laptop, restoration to the second applicant of property listed in annexure B by handing over the property to a firearms dealer designated by the applicants, return of the radio equipment in annexure C and return of applicant’s files containing his documents. Alternatively, in relation to property in annexure B and C the respondents were to pay the applicants US$23 345 and US$2 825.00 being the replacement value of the property in annexure B and C respectively. The applicant also wanted the respondents to pay the costs of the suit.

On 19 July, 2012, the respondents filed a notice of opposition and attached opposing affidavits from the first respondent and the fifth respondent.

On 24 August, 2012, the applicants filed an answering affidavit. And on 23 October 2012, the applicants filed their heads of argument.

The respondents did not file heads of argument. They were therefore barred in terms of r 238 (2) of the High Court Rules. In terms of the High Court Rules, the barred party can apply for upliftment of the bar, but there was no such application from the respondents and on the date of the hearing, there was no appearance for the respondents.

Such conduct from the respondents’ legal representatives is shocking, to say the least. An applicant who was convicted for contravening the Public Order and Security Act was applying to have among other things, the firearms seized from him at the time of arrest returned to him. One would have expected the respondents’ legal representatives to be very alert and ensure that they complied with every court rule to ensure a proper defence in the matter. This was not the case.

The court proceeded in terms of r 238 (2b) and dealt with the matter on the merits. The applicants presented their application and the court sought clarifications from counsel. When applicant’s counsel was presenting his last clarification to the court following a query, that is when an officer from the Attorney General’s office walked in and tried to interject. The court did not give him audience because he was already barred and proceedings were almost over.

The court expects the legal representatives of the respondents to take their work more seriously than they did in the present case in order to adequately assist the court in the discharge of its functions.

On the merits of the application, the court observed a lot of errors in the founding affidavit. A founding affidavit is the document upon which an application is founded and as such it should be prepared seriously with the object of making the basis of the application clear to the court. If a founding affidavit is full of errors: the accuracy of its content is compromised. It appears applicants counsel did not proof read the founding affidavit before filing and such carelessness cannot be tolerated.

In para 1 of the founding affidavit, the affidavit states:

“1. I am the applicant in this matter. I am also a Director in the applicant.”

During the hearing, the second sentence was reconstructed to read “I am also a Director in the second applicant.”

The third sentence reads as follows: “I depose to this affidavit in my personal capacity and in my capacity as a Director in the second and third applicants ……” There is no third applicant in this application so the “third applicants” was struck out.

Paragraph 8 says,

“In March 2006 I was arrested by the fourth respondent…..”

The fourth respondent is the Attorney General and he was not the arresting authority so fourth respondent was struck out and replaced with fifth respondent. In para 11, the second respondent was struck out and replaced with the second applicant and the fourth respondent was struck out and replaced with the fifth respondent. In para 13 second respondent was struck out and replaced with second applicant. In para 14, second respondent was struck out and replaced with the second applicant. In para 17, second respondent was struck out and replaced with second applicant on three occasions in three different sentences.

In the draft order, the first applicant seeks the return of his watch Trade Mod S3001B and a Hewlett Packard laptop. During the hearing, applicant’s counsel abandoned the claims for the return of the wrist watch and laptop. On the wrist watch he said in view of the dispute that it was never recovered and in view of the fact that applicant had no evidence to prove that indeed it was recovered, applicant had no option but to abandon the claim. Regarding the laptop, applicant’s counsel conceded that first applicant did not know its serial number and that he had no other identifying features for it. The claims for the wrist watch and laptop therefore fell by the wayside.

The applicants sought the return of the property listed in annexure B which comprised a list of mainly different types of firearms from 1 to 29. In their opposing affidavits, the first and fifth respondents averred that some of the firearms on annexure B were never recovered. During the hearing, applicants’ counsel abandoned his clients claim to the firearms whose recovery was disputed but said those which were recovered should be returned to the applicants. Applicants’ argument was that at the time the firearms were seized by the police, the second applicant lawfully possessed them as it had a license. However, in para 17 of the founding affidavit, the applicants concede that the license which the second applicant had at the time of arrest expired and was not renewed; para 17 actually states the following;

“I am aware that second applicant cannot be in lawful possession of the firearms at this stage.”

The above concession means the court cannot make a decision to return the firearms in annexure B to the applicants because second applicant cannot lawfully possess them anymore.

In terms of s 59 (1) (iii) of the Criminal Procedure and Evidence Act [*Cap 9:07*] referred to by the applicants, if the person the article was seized from cannot lawfully possess the article and the police officer concerned does not know a person who may lawfully possess the article, the article shall be forfeited to the state. There is no provision in s 59 above or in any other relevant section which provides for a sale as suggested by the applicants in para 17 of their founding affidavit. The only option if the officer does not know of a person who may lawfully possess the seized article is forfeiture to the state. Sections 61 and 62 of the Criminal Procedure and Evidence Act (*supra*) are similarly worded and they too provide for forfeiture to the state, without notice to any other person.

Consequently, the applicants’ prayer that the seized firearms should be sold on their behalf or a replacement value paid to them cannot succeed.

The applicant’s prayer was also for the return of some radio communication equipment which they say belonged to second applicant and was licensed by Postal and Telecommunications Regulatory Authority of Zimbabwe (POTRAZ). However, the applicant failed to produce the Postal and Telecommunications Regulatory Authority of Zimbabwe (POTRAZ) license to show that the second applicant still has a valid license for the radio equipment. Proof that a person may lawfully possess a seized article is a requirement before the seized article can be returned to them. Consequently, in the absence of proof that the second applicant still has a valid license for the radio equipment, the court cannot order its return to the applicants.

The applicant is also seeking the return of his several files containing his documents. During the application hearing, applicants’ counsel conceded that there were no identifying features on the files neither could the first applicant provide the number of the files. It is not possible for the court to order the release of unknown files without any identifying features.

The application is therefore dismissed, with costs.

*Maunga, Maanda and Associates*, napplicants’ legal practitioners