

ENESIA MUDENHA
versus
ROBERT MHLANGA
and
ARTHUR CHIKUKWA
and
SUPERINTENDENT DAFANA
and
COMMISSIONER GENERAL OF POLICE

HIGH COURT OF ZIMBABWE
MANGOTA J
HARARE, 25 and 29 April, 2016

Urgent Chamber Application

B. Diza, for the applicant
I. Ndudzo, for the 1st respondent
2nd respondent in person
Ms S. Chafungamoyo, for the 3rd & 4th respondents

MANGOTA J: On 15 November, 2014 the applicant purchased the motor vehicle which is the subject of these proceedings from Langbay Enterprises (Pvt) Ltd. She retained the motor vehicle from the mentioned date up until the week which commenced on 18 April, 2016 when she received a call from Inspector Hondo of ZRP Chiredzi. Inspector Hondo, according to her, demanded that she surrendered the vehicle to him for onward transmission to the third respondent of Serious Fraud Section, Harare.

The applicant statement was that, following the call which she received, she confronted the second respondent on the issue of the car. The second respondent, she said, advised her that the first respondent was making an effort to resile from a contract which the two of them – the first and second respondents – had earlier on concluded between them in regard to the car and other items. She stated that she made an effort to ascertain the propriety or otherwise of her ownership of the car. She said, pursuant to the stated effort, she filed an application with this court under case number HC 4070/16. That application, she said,

remains pending before the court. She averred that she served the third respondent with a copy of the application on 20 April, 2016. She raised concern on the point that the third respondent continued to call, and demand from, her that she should surrender the vehicle to him failing which he would arrest her for not complying with his orders. She said the above was the reason which prompted her to file the present application on an urgent basis. She said she would suffer serious prejudice if the application was not granted in her favour.

The second respondent supported the application. He stated that the first respondent was using the police to force him into succumbing to his (first respondent's) whims. He said he entered into a contract with the first respondent as a result of which the latter gave to him the car which is in issue in this case in addition to a Lexus motor vehicle, \$120 000 and a house which is situated at number 30 Guy's Cliff, Greystone Park, Harare. He stated that the fact that the first respondent made attempts to have him arrested by the police in Bulawayo when the cause of action arose in Harare said it all. He claimed that the first respondent was using his friends who were members of the police force and were based in Bulawayo to renege from the agreement which he concluded with him prior to him selling the car to the applicant.

The first, third and fourth respondents put up a stiff opposition to the application. The first respondent's position was that the second respondent was conniving with the applicant to defeat the course of justice. He said the second respondent defrauded him. He stated that the second respondent misrepresented to him about his (the second respondent's) ownership and interest in a special grant of a mine which is in Masvingo area. He claimed that he parted with his valuable property as a result of the misrepresentation which had been made to him. He said he wanted to recover his property. He stated that he reported the second respondent's fraudulent activities to the police on 26 January, 2016. The police, he said, arrested the second respondent and took him to the court in Bulawayo where the prosecution remained of the view that the second respondent had to appear at the court in Harare. The matter which pertained to the second respondent was transferred to Harare in February 2016, according to him. He averred that the police in Harare were finalising their docket and would summons the second respondent to appear at the court in Harare. He took issue with Annexure A which the applicant attached to the application. The annexure is the agreement of the sale of the car. The applicant and Lingbay Enterprises (Pvt) Ltd concluded the agreement. He said, to the extent that she purchased the car from Lingbay Enterprises (Pvt) Ltd, the applicant was not an innocent purchaser. He said the applicant did not tell the court of how she acquired rights in the car. He stated that the applicant had tainted title to the car.

The third and fourth respondents stated that their investigations of a fraud which the second respondent perpetrated upon the first respondent were almost complete. They said the second respondent was scheduled to appear in court at Harare on 12 May, 2016. They insisted that the car should be handed over to them as it would form the basis of the second respondent's prosecution. The car, they said, should remain in their hands as it would be produced as an exhibit at the trial of the second respondent.

The undisputed circumstances of this case were that in July, 2014 the second respondent made representations to the first respondent. The representations were to the effect that the second respondent was a shareholder and director of a company known as Rock Rabbit Enterprises, a mining company. He, it was alleged, told the first respondent that he was mandated to sell a special grant to prospect for coal on behalf of Rock Rabbit Enterprises. He allegedly assured the first respondent that the core (*sic*) deposits in the indicated area on the special grant were economically viable. The representations, it was stated, persuaded the first respondent to buy the company and the special grant. He, as payment for the same, surrendered to the second respondent:

- (a) his number 30 Stonechart Lane house which is in Borrowdale, Harare. The house was valued at \$2.5 million
- (b) the Toyota Prado motor vehicle which is the subject of this application. Its value was placed at \$60 000.
- (c) a Toyota Lexus motor vehicle with registration number ACD 5457 which was valued at \$40 000 – and
- (d) \$125 000.

There is no doubt that the first respondent parted with items of a substantial value as a result of the representations which the second respondent made to him. Whether or not such representations were misrepresentations is not for this court to determine. Another court will determine that.

What the court finds strange to a point of being difficult to believe is that the second respondent was allowed to remain free and to move about as well as to go about his daily business when the fraud which he is alleged to have committed was so phenomenal as to defy all accepted proportions.

It goes without saying that, if the fraud which the second respondent is alleged to have committed was so substantial as the first, third and fourth respondents alleged, the second respondent would not have been allowed to move about as freely as he is doing.

The second respondent stated that he was taken to the court in Bulawayo. He said he was not formally charged. He stated that no warned and cautioned statement was recorded from him. The first, third and fourth respondent did not challenge his assertions in the mentioned regard.

Nothing was said about the Greystone house the value of which is in excess of \$1 million or the Toyota Lexus motor vehicle or the cash of \$125 000 which the first respondent parted with following the representations which had been made to him.

It is the court's considered view that, if the second respondent was such a fraudster as the first respondent would have the court believe, the third and fourth respondents would have wasted no time. They would have arrested and brought him to book with the speed of lightning. The probabilities of the matter are that the charge of fraud which the third and fourth respondents preferred against the second respondent appear to be the first respondent's cooked up story which induced the third and fourth respondents to act upon.

The second respondent stated, and the first, third and fourth respondents agreed, that the police arranged that he be taken to the court in Bulawayo. The reasons for taking the second respondent to the court in Bulawayo when everything which pertained to the alleged fraud occurred in Harare were not proffered. The second respondent stated that the first respondent was using his friends who were members of the police force and were based in Bulawayo to assist him to resile from the contract which he concluded with him. The second respondent's statement in the mentioned regard was not challenged. It was evident even to the naked eye that the first respondent was abusing the police and the court for his own unknown reasons.

The prosecutors in Bulawayo were not part of the first respondent's machinations. They, therefore, did not see the need to bring the second respondent before the court so that he would be formally informed of whatever charges as were being preferred against him. The prosecutors in Harare did not as well see the need to have the second respondent placed on remand. They could not place him on remand for what appeared to be a purely civil matter.

The third and fourth respondents were, in the court's view, not being candid when they stated that the second respondent's trial was scheduled for 12 May, 2016. They would not have allowed him to see the light of day if the charge which they were preferring against him and its magnitude were holding. They appeared to have virtually nothing against him. They did not even state that they recovered from him the Greystone house or the Toyota Lexus motor vehicle or the sum of \$125 000 which the first respondent parted with as a result

of the alleged fraud. They centred all their efforts on the motor vehicle which is the subject of this application.

The car which is the subject of this application was sold to the applicant by the second respondent on 15 November, 2014. The applicant retained possession, ownership and control of the car from the mentioned date to date. When her ownership of the same was challenged by the third and fourth respondents, the applicant did what the law allowed her to do. She applied to court to have the issue of ownership of the car determined. Her application in the mentioned regard remains pending before this court.

The first respondent's argument which was to the effect that the second respondent did not sell the car to the applicant does not hold. The applicant confronted no one else but the second respondent when her possession and ownership of the car were under threat. She would not have approached the second respondent if the latter was not the person who sold the car to her. He, it is evident, sold the car to her through Lingbay Enterprises (Pvt) Ltd.

Going by the premise that the first, third and fourth respondents appeared to have engaged themselves in what may be described as a wild goose chase, it is only proper that the applicant be allowed to retain possession and control of the car pending the determination of her application under case number HC 4070/16. It is also proper that the applicant be interdicted from disposing of the car pending her said application and any other action which may arise out of her possession and control of the car.

The court has considered all the circumstances of this case. It is satisfied that the applicant proved her case on a balance of probabilities. The interim relief is, accordingly, granted as prayed. The vehicle which is the subject of this application will remain in the possession and control of the applicant who shall not dispose of it pending finalisation of case number HC 4070/16 or any action which may arise out of the motor vehicle.

In the premise, it is ordered as follows:

1. Pending finalisation of case number HC 4070/16 the respondents and anyone acting through them, including any arm of state, be and are hereby interdicted from demanding the surrender of or taking from the applicant's possession the Toyota Prado motor vehicle with registration number ADQ 9965.
2. The applicant be and is hereby ordered not to dispose of the motor vehicle, Toyota Prado, registration number ADQ 9965 pending finalization of her application under case number HC 4070/16 or any action - civil or criminal - which may arise out of the motor vehicle.

Mhishi Legal Practice, plaintiff's legal practitioners
Civil Division of the Attorney General's Office, 3rd & 4th respondents' legal practitioners