ALLAH M TUFAIL
versus
ERNEST ITANYI
and
THE REGISTRAR CVR

HIGH COURT OF ZIMBABWE
CHITAKUNYE & NDEWERE JJ
HARARE, 9 February 2016 and 1 February 2017

Civil Appeal

K Gama, for the applicant
M Ndebele, for the respondents

NDEWERE J: The appellant was the applicant in the court *a quo.* In his founding affidavit, he stated that he lent US$10 000-00 to the first respondent on 4 September, 2014, payable on or before 4 October, 2014 in terms of a written agreement concluded on 4 September 2014. In terms of the said agreement of sale, the first respondent surrendered a BMW 320iA, registration number ACU 3318, its registration book and keys as security for the loan. The vehicle was to be returned to the first respondent after the loan repayment. If the first respondent breached the agreement, the lender was entitled to appropriate or dispose of the vehicle. The agreement, which appears on pages 16 to 17 of the court record, was signed by both parties and witnessed.

In January, 2015, the appellant gave notice that on 6 February, 2015, he would apply to the magistrates' court seeking confirmation that he was now owner of the BMW 320iA because the first respondent had not paid back the loan on or before 4 October, 2014. On 5 February, 2015, the first respondent filed a notice of opposition and an opposing affidavit.

In his opposing affidavit, the first respondent said the appellant's allegations were false. He said the correct position was that the appellant ran a company called Luzern Enterprises (Pvt) Ltd and that the appellant received an audit from Zimra which indicated that Luzern owed

US$1 098 893-63. He said the appellant then approached him requesting that he finds a Tax Consultant on his behalf who would work with Zimra and make payment proposals. The first respondent said he looked for a consultant who said he wanted a down payment of US$10 000-00. He said the applicant said he would pay the US$10 000-00 but he wanted security from the first respondent as the person who had introduced the Tax Consultant. The first respondent accepted that arrangement since he had confidence in the Tax Consultant doing the job properly.

He said the appellant later terminated the arrangement with the referred tax consultant, saying he had found someone who would do the job more quickly and for less money.

The first respondent submitted that since the appellant was the one who cancelled the arrangement for which the $10 000-00 deposit had been paid, he should hand back his motor vehicle.

The application was dealt with by the court *a quo* on 3 March, 2015. At the start of proceedings, the parties said they had agreed that the matter be determined on the papers filed of record. On p 7 of the record, the magistrate stated as follows:

> "After going through the submissions by the parties this court is of the view that there are disputes of fact and as such this matter cannot be decided on the papers. The fact that there are two different versions leading to the drafting of the acknowledgment of debt requires that the matter be referred to trial.
>
> The papers filed of record will stand as the parties pleadings and matter should proceed to PTC stage.
>
> Accordingly, application be and is hereby dismissed."

On 10 April 2015, the appellant filed an appeal with the High Court. The following were the grounds of appeal:

> "(a) The court *a quo*, with respect, erred by refusing to interpret and enforce the parties written contract in accordance with the parole evidence and caveat *subscripto* rules without giving any reason for not applying the rules.
> (b) With respect, the court *a quo* erred by finding that there were material disputes of fact and by dismissing the application in the absence of any allegation of misrepresentation, fraud, duress, undue influence, illegality or mistake.
> (c) With the greatest respect, the court *a quo* erred by purporting to refer a dismissed application to trial. Having dismissed the application, there was nothing to refer to trial. Conversely, having referred the matter to trial, the court could not dismiss the application before such trial."

In her comments to the grounds of appeal, the magistrate conceded that she should not have dismissed the application. On p 3 of the appeal record she stated the following:

> "I still maintain that there are material disputes of fact and that is the reason the matter was referred for trial.
>
> I however do concede that it was an error on my part to dismiss the application and then refer the matter for trial. The intention was to refer the matter for trial."

The magistrate's concession refers mainly to ground of appeal (c). In relation to ground (a) and (b), she still maintained that there were material disputes of facts and the matter should be referred to trial.

The appellant, on the other hand, contended that the appeal should be allowed and the following relief granted:

"(i) The application be and is hereby granted.
(ii) the applicant's ownership of a BMW 320iA motor vehicle, Registration Number ACU 3318, Chasis Number WBA VA 76040 NK 73977 and Engine Number B 471H885, be and is hereby confirmed.
(iii) The second respondent is hereby ordered to register the vehicle in the name of the applicant.
(iv) 1st respondent shall pay the costs of this suit on an attorney and client scale."

Our view is that the magistrate's court decision to refer the matter to trial cannot be faulted. The magistrate found herself with two different factual positions from the appellant and the first respondent. What the appellant stated in his founding affidavit was denied as being false and the first respondent gave what he termed the correct position. In other words the first respondent was alleging factual misrepresentations by the appellant. To make matters worse, no answering affidavit was filed timeously by the appellant to answer to the assertions of factual misrepresentations by the first respondent in his opposing affidavit. So technically, the appellant's founding facts were seriously disputed by the first respondent; and then the appellant omitted to file an answering affidavit to clarify issues further. The appellant is the one who approached the court on 15 January, 2015, giving notice of his application and filing his founding affidavit. The first respondent opposed on 5 February, 2015. There was ample time for the appellant to file an answering affidavit between 5 February, 2015, the date of opposition and 3 March, 2015, the date the application was heard. Why did the appellant fail to timeously answer to the first respondent's assertions; if such assertions were incorrect?

Without the answering affidavit, the first respondent's opposing affidavit remains uncontested by the appellant. Faced with such a scenario, the court *a quo* cannot be blamed for concluding that the matter could not be decided on the papers but should be referred to trial.

We are of the same view that the interests of justice are best served by adopting the approach by the learned magistrate and no prejudice will be faced by the appellant from a trial of the issues. As a result, the appeal will be allowed to the extent conceded by the magistrate; that she ought not to have dismissed the application, but should have referred the matter to trial. Accordingly, it is ordered as follows:

(a) That the appeal be and is hereby allowed.
(b) The matter is referred to trial.
(c) The papers filed of record shall stand as the parties' pleadings and the matter shall proceed to the pre-trial conference stage.
(d) Costs will be in the cause.

CHITAKUNYE J: agrees:……

Gama & Partners, applicant's legal practitioners
Chadyiwa & Associates, 1st respondent's legal practitioners