

**DAVID MAX VILOEN**

**Versus**

**STEPHEN TSHUMA**

**And**

**LEWIS A NKALA**

IN THE HIGH COURT OF ZIMBABWE  
NDOU J  
BULAWAYO 10 SEPTMBER AND 9 DECEMBER 2004

*S S Mazibisa* for applicant  
*T Moyo* for 1<sup>st</sup> and 2<sup>nd</sup> respondents

Judgment

**NDOU J:** The applicant is the plaintiff in HC 1150/04 wherein he issued summons against the respondents for cancellation of agreement of sale between applicant (plaintiff) and first respondent (defendant) and return of a Toyota Hilux registration number 487-075D. This application arises from the same facts. The applicant obtained *ex parte* provisional order in the following terms:

**“Terms of the final order**

That the provisional order granted by this honourable court be confirmed in the following manner:

- (a) That the agreement of sale, if any, between the 1<sup>st</sup> and 2<sup>nd</sup> respondents over applicant’s motor vehicle a Toyota Hilux, registration number 487-075D be declared null and void and of no force or effect.
- (b) That the Toyota Hilux, registration number 478-075D be kept by the Deputy Sheriff, Bulawayo pending the finalisation of case number HC 1150/04.
- (c) That the 1<sup>st</sup> respondent should permanently keep his peace and desist from being violent to the applicant and his family.
- (d) That the 1<sup>st</sup> respondent only should pay costs of suit on an attorney-client scale for this application.

**Interim Relief Granted**

Pending the finalisation of the matter the applicant be granted the following relief:

1. That the Deputy Sheriff, Bulawayo be and is hereby directed to seize and take into her custody a Toyota Hilux registration number 487-075D (sic) from the respondents or those claiming through them and from wherever it can be found or located and keep it in her possession or custody until the finalisation of case number HC 1150/04.
2. That the 1<sup>st</sup> respondent should keep his peace towards the applicant and his family.”

The applicant seeks confirmation of the said interdict. From the opposing affidavit the first respondent averred that the applicant proposed to sell him the disputed vehicle because it was almost a wreck. The vehicle registration book had been impounded by Vehicle Inspection Department officers in Plumtree on account of its unroadworthy condition. The vehicle had no head lights, had worn out tyres and bushes, had no grill, had oil leaks and had no front suspension. The correct price for the vehicle was \$5 million. He further averred that first respondent was purchasing the vehicle so as to repair it and pass it on to a new purchaser as that was the business that first respondent survived on. After the purchase he repaired all the above defects and completely spray painted it. He further stated he paid as part of purchase price \$1 950 000,00 through a G Whitehead as instructed by the applicant. He paid applicant \$700 000,00 in cash, a further cheque payment of \$1 000 000,00 was made. Applicant also received petrol, diesel, 2 tyres and tube, total \$830 000,00 which he opted to set off against the purchase price. He further stated that he introduced second respondent to the applicant as the person who had bought the disputed vehicle. Second respondent said that he gave 1<sup>st</sup> respondent his Mazda 626 plus \$9 million a full purchase price for the vehicle in question. He confirmed that the first respondent introduced him to the applicant as the new owner. Applicant shook hands and went

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on to show him several functions of the vehicle. Thereafter he would meet the applicant driving the vehicle and they wave at each other. In the face of such averments it was foolhardy on the part of the applicant to fail to file an answering affidavit. These allegations by the respondents go to the core of the applicant's case. As they stand uncontroverted the very basis of the interdict falls away. The opposing affidavits show that the urgency is either self induced or non-existent.

A detailed explanation is given in this regard. Once given this is not controverted. Accordingly, there is no basis for the urgency. In the absence of answering affidavit the application is materially challenged.

Accordingly, the provisional order granted on 2 April 2004 be and is hereby discharged with costs.

*Cheda & Partners*, applicant's legal practitioners

*Hwalima, Moyo & Associates*, respondents' legal practitioners