Judgment No. HB 64/2004
Case No. HC 1407/04

SAMSON SAYI

Versus

SAMUEL SIBANDA

IN THE HIGH COURT OF ZIMBABWE
NDOU J
BULAWAYO 5, 7 AND 20 MAY 2004

J Mutsauki for applicant
K Ncube for respondent

Urgent Chamber Application

NDOU J: The applicant seeks a provisional order in the following terms:

"**Terms of Final Order Sought**

It is ordered:

That you should show cause to this honourable court why a final order should not be made in the following terms:

1. The respondent be and is hereby ordered to surrender to the applicant the motor vehicle registered number 339-700N upon service of this order on him failure to which the Deputy Sheriff or her lawful assistants be and is hereby authorised to collect the vehicle and deliver it to the applicant.
2. The respondent shall pay costs of this application on an attorney-client scale.

Interim Relief Granted

That pending confirmation or otherwise disposal of this provisional order:

3. The Deputy Sheriff or her lawful assistants are hereby authorised to forthwith sieze vehicle registration number 339-700N from the respondent and deliver it to the applicant or his lawful representative.

Service of Provisional Order

4. The copies of this order and the chamber application shall be served upon the respondent by the Deputy Sheriff."

The factual history of this matter is disputed by the parties to a great extent. What, however, is beyond dispute is the following. The parties are neighbours. The vehicle mentioned above belongs to the applicant. Sometime in October 2003 the vehicle was lawfully handed over to the respondent by the applicant. The purpose of the handing over is hotly disputed. It is common cause that whilst the vehicle was in the respondent's custody he effected certain material repairs thereon. The vehicle was in the custody of the respondent until 15 December 2003. On this date the vehicle was consensual handed over to the applicant by the respondent. There is a dispute on the terms of such hand-over. On 14 January 2004 the respondent through his company issued summons against the applicant claiming , $5million being the costs of the above mentioned repairs carried out on the vehicle under case number HC 112/04 in this court. The applicant entered an appearance to defend the said action on 28 January 2004. This matter is still pending. On 6 February 2004 the applicant handed over the vehicle to the respondent at his (i.e. applicant's) place of work at TelOne Exchange, Northend. In addition to the handing over of the vehicle, the applicant wrote a document to the effect that he was surrendering his vehicle as security for money that he owed the respondent. The applicant signed the document and the respondent took away the vehicle with him. In essence the applicant's case is that he wrote and signed the document under duress and handed the vehicle similarly under duress. The respondent' case is that the applicant approached him and offered him the vehicle as security and wilfully wrote the document as a means of starving off his claim in HC 112/04 supra. He stated that the applicant only reported the alleged taking under duress to the police three days later, and only instituted these proceedings some two months later as pointing to the fact that the deprivation had

been consented to. He said, in any event the vehicle was parked inside the TelOne premises and if it was deprived under unlawful or criminal circumstances the applicant would have informed the security guards at the gate.

I have to endeavour to resolve the disputed issue of duress on the affidavits, by adopting a robust and common sense approach – *Zimbabwe Bonded Fibreglass (Pvt) Ltd* v *Peech* 1987 (2) ZLR 338 (S) at 339C-D and *Botha & Anor* v *Barrett* 1996 (2) ZLR 73 (S) at 79C-D. Looking at the facts of this case, such a resolution has real possibility of doing injustice to the respondent. In any event, the onus is on the applicant to show that he had no consented to being deprived of the possession. No onus rests upon the respondent to establish the applicant's consent. *Botha* v *Barrett supra* at 79G. This issue cannot be resolved on the papers before me because it mainly determined on the demeanour of the witnesses and not on a balance of probabilities. It is trite that in order to obtain the spoliation order that he seeks, the applicant has to make and prove two allegations. These are:

(a) that the applicant was in peaceful and undisputed possession of the vehicle. This he has done.

(b) That the respondent deprived him of the possession forcibly or wrongfully against his consent – *Nino Bonino* v *de Lange* 1906 TS 120 at 122, *Kramer* v *Trustees Christian Coloured Vigilance Council, Grassy Park* 1948 (1) SA 748 (C) at 753; *Davis* v *Davis* 1990- (2) ZLR 136 (H) at 141C and *Botha & Anor* v *Barrett, supra* at 79E-F.

The issue of loss of possession under duress is in the circumstances of this case, a triable one. It cannot be resolved by the adoption of a robust and common sense approach. I am not in a position to make a finding on the real issue between the

parties. The matter must be referred to trial for evidence to be led on the question of duress. As alluded to, the matter is already subject matter of HC 112/04. A case for the interlocutory spoliation remedy has not been established.

Accordingly, the application is dismissed with costs.

Marondedze, Nyathi, Majome & Partners, applicant's legal practitioners
Job Sibanda & Associates, respondent's legal practitioners