

**ROBERT NKOMO**

**Versus**

**TAWEDZERA SEVENZAI**

IN THE HIGH COURT OF ZIMBABWE  
DUBE-BANDA J  
BULAWAYO 22 JULY 2022 & 28 JULY 2022

**Urgent application for an interim interdict**

*Prof. W. Ncube* for the applicant  
*L. Ncube* for the respondent

**DUBE-BANDA J:**

**Introduction**

1. This is an urgent application. The applicant seeks a provisional order couched in the following terms:

Terms of the final order sought

That you show cause to this Honourable Court why a final order should not be made in the following terms:-

- a. That pending the finalisation of case No. HC 212/22
  - i. The provisional order granted by this Honourable Court on the ..... Day of July 2022 be and is hereby confirmed.
  - ii. The respondent be and is hereby ordered, interdicted and prohibited from in any way selling or otherwise disposing of the Toyota Motor vehicle Registration Number AEF 6948.
- b. That respondent be and is hereby ordered to pay costs of suit on an attorney and client scale.

Interim relief granted

Pending the confirmation or discharge of the provisional order applicant is granted the following interim relief:-

- a. Respondent be and is hereby interdicted from selling or otherwise disposing of the Toyota Hilux motor vehicle Registration No. AEF 6948.

Service of the provisional order

Applicant, applicant's legal practitioners or any person in the employ of applicant's legal practitioners or the Sheriff of the High Court or his lawful deputy or Assistant at Bulawayo shall serve this provisional order on respondent.

2. The application is opposed by the respondent. In support of the opposition the respondent filed a notice of opposition and an opposing affidavit.

### **Background facts**

3. This application will be better understood against the background that follows. The applicant contends that on the 3<sup>rd</sup> April 2021, he entered into a loan agreement with respondent. He was advanced USD5 500.00 which the parties agreed would be payable on the 24 April 2021, together with interest and the total payable would turn to be USD7 150.00. According to the applicant it was agreed that he would pledge his motor vehicle a Toyota Hilux motor vehicle Registration No. AEF 6948 (vehicle), as security for the due repayment of the loan. The applicant surrendered possession of the vehicle to the respondent in exchange of the USD5 500 in cash.
4. The applicant failed to render payment of the amount on the USD7 150.00 on the agreed due date. He says he advised the respondent who agreed that the amount could be paid on another date together with further interest. Sometime in or about August 2021, the applicant tendered payment of USD9 000.00 and requested his pledged motor vehicle back. The respondent refused to accept the USD9 000.00 and demanded payment of USD15 000.00 to release the vehicle.

5. On the 4<sup>th</sup> February 2022, the applicant sued out a summons (HC 212/22) against the respondent claiming the release of the vehicle. The matter is awaiting a set down date for pre-trial conference before a judge. The applicant contends that he has evidence that the respondent is on the verge of selling the vehicle to a third party. The applicant seeks that the respondent be temporarily interdicted from disposing of the vehicle pending the confirmation or discharge of the interim relief he seeks in this application. It is against this background that the applicant has launched this application seeking the relief mentioned above.
6. Other than resisting the relief sought on the merits, the respondent took a preliminary objection which was also the subject of argument in this matter. The respondent contended that this application is not urgent and must be struck off the roll of urgent matters.
7. At the commencement of the hearing I informed counsel that in this case I shall adopt a holistic approach. What this approach entails is that for the sake of making savings on the time of the court by avoiding piece-meal treatment of the matter, the preliminary objection had to be argued together with the merits, but when the court retires to consider the matter it may dispose of the matter solely on preliminary objection despite that it was argued together with the merits. But if the court considers to dismiss the preliminary point, it would then proceed to deal with the merits. The main consideration here is to make savings on the court's most precious resource - time - by avoiding unnecessary proliferation when the matter should have been argued all at once.
8. I now turn to consider the preliminary objection.

### **Preliminary point**

9. The respondent contends that this matter is not urgent. It was contended further that respondent purchased the vehicle from the applicant on the 3<sup>rd</sup> April 2021, and it was

re-sold to a third party on the 12 July 2021. It was submitted that if the applicant believed he had a right to protect he should have done that more than a year and three months ago and not now when the proverbial horse has already bolted.

10. In contesting the urgency of the matter, respondent relied on two paragraphs in applicant's synopsis of evidence filed in HC 212/22 attached to this application as an annexure. In these two paragraphs the applicant contends that:

- i. Plaintiff will say sometime at the beginning of August 2021, he had managed to raise USD9 000.00 which he took to the defendant to render payment. Once again he was accompanied by his wife and upon arrival at defendant's premises they tendered the USD9 000.00 they had. Defendant refused to accept the money and demanded to be paid USD15 000.00 to release the vehicle saying that was the market value of the vehicle which was now the amount payable after plaintiff had failed to pay back the money for four months.
- ii. Plaintiff will say that he had lost all hope of getting back his vehicle until his father in law advised him to consult lawyers on whether or not what defendant was doing was lawful. His father in law then took him to his current legal practitioners who advised court action and hence summons was duly issued in February 2022 on the advice of his legal practitioners.

11. Mr *Ncube* counsel for the respondent argued that the need to act arose in August 2021, and not in July 2022. It was contended that applicant should have acted then to protect his interest. This contention was premised on the fact that it must have been clear to the applicant at that stage that the respondent was not keen on releasing the vehicle to the applicant.

12. Prof. *Ncube* applicant's counsel for the applicant submitted that this matter is urgent and meets requirements of urgency. It was contended that the facts giving rise to this application arose on the 11<sup>th</sup> July 2022. There could have been no basis or grounds to file such an application before the 11<sup>th</sup> July 2022. It was argued that the applicant became aware on the 11<sup>th</sup> July 2022 that the respondent was advertising the vehicle for sale. Therefore the need to act arose in July 2022, and not earlier.

13. Counsel argued that it was incorrect that the vehicle was sold to a third party on 12 July 2021. This argument was anchored on the objective facts of this case, particularly that on the 4<sup>th</sup> February 2022, the applicant sued out a summons in HC 212/22 wherein he claimed the delivery of the vehicle, and that upon respondent failing to deliver the vehicle within 48 hours of the order the Sheriff be ordered and authorised to remove it from the respondent and deliver it to the applicant. The respondent in his plea and synopsis of evidence did not plead that he had already on the 12 July 2021 sold the car to a third party. It was submitted that if indeed the respondent had sold the vehicle as he alleges, he would have pleaded such a defence in HC 212/22. He did not.
  
14. In assessing whether an application is urgent, the courts have in the past considered various factors, including, among others: the consequence of the relief not being granted; whether the relief would become irrelevant if it is not immediately granted; and whether the urgency was self-created. See: *Kuvarega v Registrar General & Anor*; *New Nation Movement NPC and Others v President of the Republic of South Africa and Others* [2019] ZACC 27. Further to pass the urgency test, applicant must show that there is an imminent danger to existing rights and the possibility of irreparable harm. See: *General Transport & Engineering (Pvt) Ltd & Ors v Zimbank* 1998 (2) ZLR 301; *Document support Centre (Pvt) Ltd v Mapuvire* 2006(1) ZLR 240 (H); *Dextiprint Investments (Pvt) Ltd v Ace Property Investment company* HH 120/2002; *Madzivanzira & Ors v Dextrint Investments (Pvt) Ltd & Anor* 2002 (2) ZLR 316 (H); *Seventh Day Adventist Association of Southern Africa v Tshuma & Ors* HB 213-20.
  
15. I take the view that in August 2021 there could have been no basis whatsoever for the applicant to approach this court on an urgent basis. There is no evidence that the respondent had told the applicant that he was in the process of selling the vehicle. At that stage the applicant was merely concerned about the respondent's refusal to release the vehicle to him and his demand of USD15 000.00 and not that the vehicle was being sold to a third party. If the applicant had filed an urgent application in

August 2021, it could have been based on pure speculation and no court can grant an interdict based only on speculation. On the facts of this case the need to act arose on 11 July 2022. It is the date the applicant became aware that the respondent was in the process of selling the vehicle.

16. The respondent contends that he sold the vehicle to a third party on the 12<sup>th</sup> July 2021. The applicant disputes that the vehicle had been sold to a third party. I do not intend to make any factual finding whether the vehicle was sold on the 12<sup>th</sup> July 2022 to a third party nor can I make such a finding on the papers before me. That would be an argument for another day. However, solely for the purposes of this application I am not persuaded that the vehicle was sold as contended by the respondent. I say so because on the 4<sup>th</sup> February 2022 the applicant sued out a summons in HC 212/22 wherein he claimed the delivery of the vehicle. The respondent in his plea and synopsis of evidence did not plead that he had already on the 12 July 2021 sold the vehicle to a third party. Further the respondent does not dispute that he is in the process of selling the vehicle, but says he is selling it at the instance of that third party. This is an important consideration in this matter.
17. This matter passes the test of urgency. It is a textbook case of the kind of urgency anticipated by the rules of court. The certificate of urgency and the founding affidavit contain an explanation of all the actions the applicant took from the 11<sup>th</sup> July 2022 to the date of filing this application. This is a case where if the courts fail to act, the applicant may well be within his rights to dismissively suggest to the court that it should not bother to act subsequently as the position would have become irreversible to his prejudice. See: *Documents Support Centre P/L v Mapuvire* 2006 (1) ZLR 232 (H) 243G.
18. The authorities in this jurisdiction show that urgency is a matter of both time-line and harm. I take the view that this application passes both time-line factor as well as the harm factor. The preliminary objection that this matter is not urgent has no merit and is dismissed.

19. Mr *Ncube* argued and somehow as an afterthought that the failure to join one Ophani Muleya the alleged buyer of the vehicle is fatal to this application. This contention was premised on the fact that on 15 July 2022 the respondent's legal practitioners addressed a letter to the applicant's legal practitioners and made the point that the vehicle was sold in 2021 to a third party. The name of the third party was not disclosed. It was only disclosed in the notice of opposition to this application. Therefore at the time of filing of this application the identity of the third party was not known to the applicant. The applicant could not have joined a third party it did not know. The non-joinder of Ophani Muleya is not fatal to this application. This court can determine the issues or questions in dispute so far as they affect the rights and interests of the persons who are parties to this application. See: rule 32(12) of the High Court Rules 2021; *Mwazha & 9 Others v Mhambare* SC 116 / 2021. This preliminary objection has no merit and is dismissed.

20. I now turn to consider the merits of this application.

### **Ad merits**

21. The applicant seeks an interim interdict. The requirements for an interim interdict were aptly stated in *Airfield Investments (Pvt) Ltd v Minister of Lands & Ors* 2004 (1) ZLR 511(S) wherein the court said an applicant for such temporary relief must show:

- i. that the right which is the subject matter of the main action and which he seeks to protect by means of interim relief is clear or, if not clear, is *prima facie* established though open to some doubt;
- ii. that, if the right is only *prima facie* established, there is a well-grounded apprehension of irreparable harm to the applicant if the interim relief is not granted and he ultimately succeeds in establishing his right;
- iii. that the balance of convenience favours the granting of interim relief; and

iv. that the applicant has no other satisfactory remedy.

22. I now consider each requirement in turn. First whether the right which is the subject matter of the main action and which the applicant seeks to protect by means of interim relief is clear or, if not clear, is *prima facie* established though open to some doubt. The vehicle is registered in the name of the applicant. I say so because in his opposing affidavit the respondent does not say the vehicle has been transferred into the name of Ophani Muleya, he merely says that Muleya is in possession of the book. Ophani Muleya in his supporting affidavit says ‘I am in possession of the registration book.’ My view is that both the respondent and Muleya choose to be vague on whether the vehicle has been transferred or not. Only being in possession of the book does not mean it is in his name. Therefore I take the view that the vehicle is registered in the name of the applicant. For the purposes of this application I am not persuaded that the vehicle has been sold to a third part. In case number HC 212/22 the applicant has sued the respondent for the return of the vehicle against a tender of the loan amount, and nowhere except for the first time in this application that the respondent says he sold the vehicle to a third party. It is for these reasons that I am persuaded that the applicant has established a *prima facie* right in support of the right that he asserts, i.e. the right to the vehicle.

23. Will the applicant suffer irreparable harm if the interim relief is not granted and he ultimately succeeds in establishing his right on the return date? The respondent does not dispute that he is selling the vehicle, although he says he is selling it at the instance of Ophani Muleya. The factual position is that the vehicle is in the process of being sold to third parties. On the facts of this case, if the vehicle is sold before the return date, the applicant will suffer irreparable harm, I say so because even if he succeeds to establish a real right on the return date, there would be no vehicle.

24. In considering the balance of convenience the court must weigh the prejudice the applicant will suffer if the interim relief is not granted against the prejudice to the



respondent if it is granted. If there is greater possible prejudice to the respondent, the interim interdict will be refused. If there is prejudice to the respondent and that prejudice is less than that of the applicant, the interim relief will be granted. See: *Prest C. B. Interlocutory Interdicts* (1993 Juta & Co. Ltd) 78. In *casu* if the interim relief is granted, the respondent would still have an opportunity to argue his case on the return date and the vehicle will still be available. If he succeeds to thwart the applicant's case the vehicle will still be available and he will still proceed and sell it. However if the interim relief is refused and the vehicle is sold, and the applicant succeeds on the return date, the vehicle would be gone possibly forever and with no return. My view is that the balance of convenience favour the applicant.

25. On the facts of this case, the applicant has no other satisfactory remedy. Once the vehicle is sold it will land in the hands of third parties and if he succeeds on the return date, it might be very difficult if not impossible to recover it. My view is that the applicant has no alternative satisfactory remedy in this matter.

26. I take the view that the applicant has made the necessary averments and crossed the evidential threshold that has to be passed in such proceedings to merit the granting of the interim interdict. The interim interdict I intend to grant the applicant merely affords him temporary protection pending the determination of the disputed rights of the parties on the return date. It does not and is not intended in any way to resolve the dispute between the parties. See: *Muza v Saruchera & 3 Others* SC 45 of 2018; *A. Adam and Company (private) Limited and 2 Others v Goodliving Real Estate (Private) Limited* SC 18/21. In the circumstances this application has merit and the provisional order sought is granted.

In the result, I order as follows:

That pending the confirmation or discharge of this provisional order the applicant is granted the following interim relief:

The respondent be and is hereby interdicted from selling or otherwise disposing of the motor vehicle being a Toyota Hilux Registration No. AEF 6948.

*Mathonsi Ncube Law Chambers* applicant's legal practitioners  
*James, Moyo-Majwabu & Nyoni* respondent's legal practitioners