

JEFREY HONDO GWISAI
versus
MINISTER OF HOME AFFAIRS
and
COMMISSIONER GENERAL OF POLICE
and
THE OFFICER IN-CHARGE VEHICLE THEFT SQUAD

HIGH COURT OF ZIMBABWE
CHITAPI J
HARARE, 24 July, 2019 and 4 September, 2019

Opposed Application

F. Nyamayaro, for the applicant
D Chihuta, for the 2nd & 3rd respondents

CHITAPI J: In this application the applicant has applied to the court for an order in terms of his draft order which reads as follows:

IT IS HEREBY ORDERED THAT

1. The respondents are hereby ordered to release the Toyota vehicle GD6 2.8 Station Wagon; white in colour South African Registration No. FJ76YRGP to the applicant within 7 days of service of this order.
2. Respondents to pay costs of this application at the rate of attorney to client.

The second and third respondents oppose the relief sought. The second respondent adopted the grounds of opposition as set out by the third respondent who is the officer in charge of the police unit dealing with the case. The first respondent has not opposed the application.

The background to the application is as follows. On some date between 1st and 13th November, 2018 police officers from Criminal Investigation Department (CID) Vehicle Theft Squad seized and took possession of the vehicle in issue from the applicant's house 9341

Rosedean Road, Ashdown Park, Harare where it was parked. The police officers alleged verbally to the applicant that the motor vehicle was reported stolen in South Africa. The applicant averred that he sought from the police, clearer details of the alleged theft of the vehicle including by writing a follow up letter on 13 November, 2018 but that the third respondent under whose charge the vehicle is held did not respond to the letter. A copy of the letter referred to was attached to the applicant's founding affidavit as annexure D. It was indeed received by or on behalf of the third respondent to whom it was addressed on 13 November, 2018, the same day that it was written.

The applicant stated in his founding affidavit that he bought the vehicle from one Charles Kwarambo on 1 November, 2018 for USD\$22 000.00. He attached copies of the agreement of sale which he allegedly executed with the purchaser as annexure A, the South African registration book for the vehicle as annexure B and the Seller's Zimbabwe passport details as annexure C. The applicant averred that, after the sale he parked the vehicle at his house pending clearing it for importation formalities and payment of any duties chargeable by the Zimbabwe Revenue Authority – (ZIMRA). The vehicle had been allowed into Zimbabwe by ZIMRA on a temporary import permit and entered the country legally.

The third respondent did not deny that the applicant bought the vehicle as alleged by the applicant. In answer to paragraph 9 of the applicant's affidavit in which the applicant had alleged that the supposed report of theft was made to the police well after the applicant had already bought the vehicle, the third respondent stated:

“Ad para 9

7.1 This is denied. Whilst it is true that the applicant bought the vehicle on **1 November, 2018**, it is not true that there is a long period that expired between the time that the motor vehicle was imported into Zimbabwe and the date it was reported stolen in South Africa.

7.2. It is important to set the record straight by showing that the motor vehicle was imported into Zimbabwe on the **29th of October, 2018** and reported stolen in South Africa on **4th of November, 2018** at Kempton Park Police Station. See the annexed Temporal Import Permit (TIP) and Statement by the South African Complainant, one Donnay-Reze Landman which statement was recorded here in Zimbabwe on the **28th of November, 2018** attached hereto as Annexures “A” and “B” respectively.

7.3. The applicant cannot therefore say the vehicle was reported stolen way after it had been imported into Zimbabwe. The truth according to the above referred to South African complainant is that the vehicle was reported (sic) after a period of only five (5) days from the date of its importation.

7.4. The reason why it took five (5) days to report the theft is because the vehicle was alleged to be on hire from the period extending from the **24th October** to the **3rd of November 2018**. The South African complainant only reported the theft after realising that the vehicle was not returned

on the date of expiry of the hire, thus on the 3rd of November, 2018. Thus the theft was reported on the 4th of November, 2018, only a day after the disappearance of the vehicle.”

The alleged complainant’s statement which is Annexure A referred to in paragraph 7.2 of the third respondent’s affidavit is not on affidavit. The complainant nonetheless stated that Charles Kwarambo who sold the vehicle to the applicant did not steal the vehicle *per se* but had hired the vehicle and paid for the hire charges whereafter he did not return the vehicle after the hire period. Charles Kwarambo therefore took possession of the vehicle lawfully under a contract of hire between him and the alleged complainant.

Generally a failure to return an item on hire within the agreed period constitutes a breach of contract. Depending on the terms of hire, further charges in the nature of damages accrue as may be specified in the agreement of hire. Ordinarily the hirer will have paid a refundable deposit to cover for any damages which the hirer may occasion by breach of contract. The supposed complainant did not produce to the third respondent nor his officers, proof of hire of the vehicle by Charles Kwarambo nor any documents of ownership of the vehicle by the supposed complainant. The supposed complainant did not provide a supporting affidavit to verify the alleged theft of the motor vehicle. The report of theft of the vehicle remains an unsupported and bald allegation.

The applicant’s complaint is that there is no reasonable or probable cause to deprive him of the vehicle and that the third respondent is not justified to rely on an unverified and unsupported report of theft of the vehicle in the circumstances. The allegation by the third respondent that the motor vehicle was reported stolen a day after its “disappearance”, must be taken as a bare expression. The motor vehicle did not disappear. It was on the allegation by the supposed complainant not returned upon the expiry of the period of hire as agreed. The third respondent also relied as justification for police action to impound the vehicle on an Interpol radio report. The Interpol radio of 14 November, 2018 stated that the vehicle was “*listed as stolen in the Interpol data base.*” The radio report directed that the motor vehicle should be impounded as an exhibit. It stated in part as follows:-

“... whilst you initiate further investigations from the person who has possession of the vehicle CMM supply us their particulars and circumstances as to how they obtained the vehicle. Stop also state any requirements you need from South Africa for your investigations.”

The third respondent also averred in paragraph 7.6 of the affidavit that the applicant made a report of fraud against the seller of the vehicle Charles Kwarambo under CR57/11/18; VTS DR 38/11/18. It is not clear whether the report was intended to compromise the claim of the applicant to have bought the vehicle. It however appears to have been a report whose veracity was conditional upon investigations being initiated and a determination of theft having been made by competent authority. This reasoning is fortified by the averment made by the third respondent in paragraph 7.7 of the opposing affidavit as follows:

“7.7. The fact that there is a registration book for the vehicle and passport does not change the circumstances that the motor vehicle may have been stolen in South Africa as alleged by the South African complainant. A development which needs to be investigated.”

The third respondent further stated as follows in paragraphs 8.2 and 8.3 of his opposing affidavit.

“8.2. The continued holding of the vehicle cannot be prejudicial to the applicant as it is a stolen article which was positively identified by its owner and confirmed stolen by the Interpol through a radio signal originated from Interpol Harare to Crime VTS Harare. The radio signal can be produced in court through the 3rd respondent’s legal practitioners.

8.3. Applicant should know that the only process that is outstanding is its repatriation. Hence the relief that he is seeking does not hold water.”

The impression one gets from the third respondent’s quoted averments is that the third respondent has already concluded that the vehicle was stolen. The third respondent did not carry out any further investigations other than to record a statement from the supposed complainant. Note has already been made that the statement of the complainant is not on affidavit and that there are no supporting documents or independent corroborative evidence of what the supposed complainant stated in the statement. Ownership of a motor vehicle cannot be proven by a mere say so of a claimant. Whilst the registration book may not be conclusive proof of ownership, it connects the person indicated as owner to the motor vehicle. The third respondent did not cause the investigation or authentication of the registration book which the applicant produced in the name of the Charles Kwarambo. From the court’s perspective, the registration book remains the only document connecting the alleged seller Charles Kwarambo to the motor vehicle. The alleged complainant did not produce any documentation for the vehicle nor impugn the registration book in Charles Kwarambo’s name.

The third respondent referred to the Interpol report which was received by his station concerning the vehicle. I have quoted the material portions of the report. Significantly, Interpol

requested that investigations should be carried out and that Interpol be advised of any information or documents which the third respondents station would require to be furnished to assist in investigations. Common sense and logic dictate that the third respondent and his station should have called for documents of ownership of the vehicle by the supposed complainant and authenticated the claim.

This was not done. The third respondent did not state anywhere in the opposing affidavit that it is intended to carry on further investigations, be they of fraud or to follow up on the theft of motor vehicle report made by the supposed complainant. There was no evidence presented or alleged of the applicant's admission of the alleged theft or his consent to have the vehicle remain impounded or to its repatriation to South Africa. The third respondent's investigation consisted, as already alluded to in entertaining the supposed complainant who physically identified the vehicle and had a spare key which opened the vehicle. A statement was then recorded. Such investigation if it can be termed so, was shallow and perfunctory, done with no real interest. It was a typical example of a cursory, sketchy and superficial investigation. It would not resolve competing interests of claimants. Theft is an offence both in Zimbabwe and South Africa. It is a crime that requires to be proven beyond a reasonable doubt. The third respondent and his officers were required to gather such evidence as proved beyond reasonable doubt the supposed complainant's ownership rights and equally to disprove beyond a reasonable doubt the applicant's claim of right. This was not done. The mere fact that the supposed complainant reported a theft of the car did not on such mere say so prove the case. The third respondent even after the supposed complainant had explained that the vehicle was on hire to Charles Kwarambo did not make any effort to obtain and study the hire contract before concluding that a theft had occurred. I am unable on such scanty and unconfirmed averments of the third respondent or the supposed complainant to conclude on a balance of probabilities that the vehicle was indeed stolen or put another way, to conclude that the case is criminal rather than civil.

Although the issue was not argued, the seizure of the vehicle appears not to have been made under warrant. The general rule in terms of section 50 of the Criminal Procedure and Evidence Act, [Chapter 9:07] is that the power of the State to seize articles which are concerned in or on reasonable grounds believed to be concerned in the commission or suspected commission of an offence in Zimbabwe or elsewhere as provided for in section 49 of the same

Act must be exercised under a judicially issued warrant. Exceptions to the general rule in section 50 are to be found in sections 51, 52 and 53. I do not find it necessary to deal with the provisions denoting the exceptions. I however observe that the exigencies of a particular situation would justify the seizure of an article for it to fall within the exceptions without a warrant. This includes a seizure without warrant. The listed exceptions do not apply to this case. The third respondent appears to have acted on the strength of an Interpol radio report which requested that the vehicle should be seized. An Interpol request does not justify a violation of the law of the host country whose assistance is sought. The radio request was not and is not a warrant. The third respondent and / or his officers were required to act under warrant to seize the vehicle.

A disturbing or worrying feature of this case, is that the third respondent has not indicated that it is intended to have criminal proceedings instituted in the matter. It is important for the third respondent and all police officers to appraise themselves of the provisions of section 58A of the Criminal Procedure & Evidence Act. The section was introduced by section 21 of Act No. 2 of 2016. In terms thereof, police are enjoined to carry out an investigation and cause the institution of criminal proceedings within 21 days of seizure of an article. If no proceedings are instituted within the said period and if no notice of at least 72 hours prior of the expiry of the 21 days is given to the owner or possessor of the seized article that it is intended to continue with the article under seizure, then the seized article must be returned to the owner or possessor. The notice referred to must afford the owner or possessor 48 hours from the date of issuance of the notice to lodge a written objection to the proposed continued detention or retention of the seized article. The decision whether there should be continued detention or retention, where there has been objection made is determined by a Magistrate or Justice in terms of section 58A (4) or (5) as the case may be.

In *casu*, the third respondent acted oblivious to the rights of the possessor, the applicant as given in section 58A and averred that it is intended to repatriate the vehicle to South Africa. Such repatriation cannot be done in violation of the law. It is clear that the third respondent by virtue of the provisions of section 58A cannot lawfully continue to hold on to the vehicle. This is quite apart from the fact that I have already determined that the third respondent was not justified in the absence of a thorough investigation to conclude that the motor vehicle was stolen.

Before I pronounce my determination, I should comment on a point raised by Mr Chihuta that the copies of documents produced by the applicant, being the vehicle registration book and should have been authenticated by notarization in South Africa. Counsel referred to the High Court Authentication of Documents Rules, 1971. It is correct that foreign documents should be notarized as provided for in section 3 of the Rules aforesaid. A document is referred to as “any deed, written contract, power of attorney or other writing but does not include an affidavit sworn before a commissioner” Mr Chihuta’s point was that the copy of the registration book being a South African document should be disregarded as it was not properly authenticated. I found the objection to be academic because the case was not determined on the basis of the book. The third respondent expressly admitted that the applicant bought the vehicle. He did not carry out any further investigations on the authenticity of the book nor indeed of any purchase documents produced by the applicant. The failure to carry out a detailed investigation and failure to comply with section 58A of the Criminal Procedure and Evidence Act has rendered the continued retention and detention of the vehicle illegal.

The applicant has sought costs on the legal practitioner and client scale. There is no justification for such a scale of costs and no compelling reasons were placed before me to justify a departure from the general rule that costs should be on an ordinary scale unless the losing party has misconducted himself or herself in pursuing or defending the litigation. Costs generally also follow the result. In the absence of compelling reasons to deny the successful party his or her costs, it shall be so in this case. Had the third respondent acted in terms of s 58A of the Criminal Procedure & Evidence, I could have ordered that there be no order of costs. However, the third respondent not only failed to comply with s 58A as aforesaid but simply refrained from carrying out any independent investigations of the case preferring to simply go by what the supposed complainant said. Even the Interpol radio had requested that an investigation be done but none was done. The applicant was left with no option but to petition the court for relief.

I determine that the application succeeds and the following order is hereby made:

- a) The respondents are ordered to release to the applicant the motor vehicle held by or under the control or authority of the 3rd respondent as officer in charge Vehicle Theft Squad, motor vehicle, namely Toyota GD6 2.8 South Africa registration no. FJ76YRGP within 7 days of service of this order.

- b) The 2nd and 3rd respondents in their official capacities jointly and severally, the one paying the other to be absolved pay the costs of this application.

Farai Nyamayaro Law Chambers, applicant's legal practitioners
Civil Division, 2nd & 3rd respondent's legal practitioners