HB 46 -18
HC 548-18
XREF HC 144/18
XREF HC 3347/17

ELVIS BASIRA
versus
VIMBAI MANEMO

HIGH COURT OF ZIMBABWE
MATHONSI J
BULAWAYO 23 FERBUARY 2018 AND 1 MARCH 2018

Urgent Chamber Application

Ms M N Sibanda for the applicant
M Mahaso for the respondent

MATHONSI J: An application which is not only based on falsehood but in which the applicant withholds vital information in order to mislead the court in the hope of obtaining an undeserved relief cannot succeed. In such a situation, in dismissing the application, the court will also make an adverse or punitive order for costs as a seal of its disapproval of *mala fides* or dishonesty on the part of the litigant. See *Batore Import & Export (Pvt) Ltd* v *Bayswater (Pvt) Ltd & Another* HH 614-14 (unreported). This approach flows from the fact that the utmost good faith must be observed by all litigants who approach this court seeking the indulgence of being heard on an urgent basis or *ex parte*. In such an application, an applicant is required to disclose all facts relevant to the matter tending to have a bearing on the outcome. This court always discourages urgent applications whether *ex parte* or not which are characterized by material non-disclosures. See *Graspeak Investments (Pvt) Ltd* v *Delta Corporation (Pvt) Ltd & Another* 2001 (2) ZLR 551 (H) at 555C-D; *Moyo & Another* v *Hassbro Properties (Pvt) Ltd & Another* 2010 (2) ZLR 194 (H) at 197 A-B.

This urgent application in which the applicant seeks an anti-dissipatory interdict preventing the respondent from disposing of her motor vehicle, a Mercedes Benz C220 registration number ABI 9423, is punctuated by material non-disclosures and falsehoods. The applicant would like an order directing the respondent to keep the said motor vehicle at her house

being No 1 Butler Road Khumalo Bulawayo and that the motor vehicle be inspected by the Automobile Association of Zimbabwe which should submit a report on its condition.

In his founding affidavit the applicant stated that he entered into a written agreement with the respondent on 10 August 2017 in terms of which he purchased from her the motor vehicle in question for $28 000-00. The purchase price was to be paid in instalments of $1000-00 per week and he was to be given possession of the motor vehicle upon payment of half the purchase price. The applicant, though rooting the application on the written sale agreement, did not attach it to his founding affidavit. He stated further that he has, since the signing of the agreement, paid a total of $16 550-00 towards the purchase price which is more than half the purchase price. He however did not attach a single receipt as proof of such payment.

The applicant went on to say that the respondent delivered the motor vehicle to him in December 2017 because he had paid more than half the purchase price in terms of the agreement. A few days later the respondent started asking that the vehicle be returned to her for her to pledge it as security for a loan which she had applied for. As he had performed his part of the bargain he refused to return the motor vehicle. To his dismay the respondent "forcibly towed" the vehicle away from a private parking garage where the vehicle was kept without his consent and in the absence of the garage owner.

He stated that the respondent has refused to accept payment of the balance of $11 450-00. For that reason he was forced to issue summons against the respondent on 22 January 2018 in HC 144/18 seeking an order allowing him to pay the sums of $1000-00 per week into court until the full purchase price is paid. Pending the determination of that action the applicant craves the grant of the interdict aforesaid. He has since learnt that the respondent has had her immovable property attached by the Sheriff in execution of a judgment of this court in the sum of $60 000-00 granted against her. He therefore has a reasonable apprehension that the respondent has pledged the vehicle, not for a loan she was applying for as alleged earlier, but to reduce the judgment taken against her by a third party.

The applicant maintained that the respondent is in possession of the vehicle illegally and in breach of the agreement of the parties.

The application is opposed by the respondent who produced a copy of the sale agreement entered into on 10 August 2017. In terms of that agreement which *Ms Sibanda* for the applicant confirmed is the one entered into by the parties:

> "The total price is $28 000-00 (twenty eight thousand dollars only). A deposit of $1000-00 has been paid. When half of the amount is reached the vehicle will be released or given to the purchaser. The payment will be made in the period of 14 weeks and clear the amount."

The respondent stated that the applicant breached the agreement by failing to pay the purchase price within the prescribed period of 14 weeks, which expired on 16 November 2017. In fact up to now the applicant only paid a sum of $7000-00 and not $16 550-00 as he alleged. He was therefore not entitled to possession of the vehicle and was never given. Quite to the contrary, the applicant requested, by separate arrangement which had nothing to do with the sale agreement, to borrow the motor vehicle on 24 December 2017 to use on a trip to Mutare with a girlfriend of his who is an acquaintance of the respondent. The respondent allowed him to use the vehicle on the understanding that he would return it on 27 December 2017 upon his return from the Mutare trip.

The respondent went on to state that upon his return from Mutare the applicant did not return the vehicle forcing her and her husband to call him repeatedly but he was no longer picking his phone. He later called to say that he had been involved in an accident using the vehicle which was then in Magwegwe. It is then that the respondent and her husband proceeded to Magwegwe but found the motor vehicle abandoned at a parking site in that surburb. With the assistance of Magwegwe Police they recovered the vehicle and towed it to their home after obtaining the keys of Tancy Dube an acquaintance of the applicant.

What the applicant did not disclose is that on 28 December 2017 he approached this court by urgent application in HC 3347/17 seeking spoliatory relief – the return of the motor vehicle to him. He deposed to an affidavit in support of that application claiming to have taken delivery of the motor vehicle on 24 December 2017 after paying a total of $13000-00 to the respondent who waived the need for him to pay half of the purchase price only for her to forcibly tow away the vehicle on 27 December 2017. In that application the applicant sought a spoliation order

especially as the respondent had told him on 26 December 2017 that she needed the vehicle in order to pledge it as security after her house was attached in execution of a judgment of $60000-00.

The applicant did not disclose that the application for spoliation was opposed by the respondent who asserted that the vehicle had not been given to the applicant in terms of the sale agreement but by separate arrangement after the agreement had fallen through owing to the applicant's failure to pay the purchase price. The respondent further denied committing an act of spoliation maintaining that the vehicle had to be returned to her on 27 December 2017 by agreement after the applicant had borrowed it for a trip to Mutare. It had to be towed to the respondent's house because the applicant had damaged it in an accident and abandoned it.

It is remarkable that the applicant did not disclose that he withdrew the urgent spoliation application on 4 January 2017. He did not disclose the true facts surrounding the release of the motor vehicle to him on 24 December 2017 including that he had left his own BMW motor vehicle at the respondent's residence as he drove to Mutare in a borrowed vehicle or that he had been involved in a road traffic accident on 27 December 2017. In fact he paid an admission of guilt fine of $20-00 at Bulawayo Traffic West for driving without due care and attention after crashing the vehicle.

Those facts are very material to the resolution of the matter and cast a completely different picture of the whole dispute. For a start they reveal that the applicant was not entitled to possession of the vehicle and was not given such possession in pursuance of a sale. They are material non-disclosures which the court frowns upon because they are designed to mislead the court into deciding the matter on incorrect information. The application should be dismissed on that basis alone given that an application stands or falls on its founding affidavit. See *Muchini* v *Adams* 2013 (1) ZLR 67 (S); *Hiltunen* v *Hiltunen* 2008 (2) ZLR 296 (H) at 301 B; *Mangwiza* v *Ziumbe NO & Another* 2000 (2) ZLR 489 (S) at 492 D-F.

Apart from that, this being an application for an interdict it must satisfy all the traditional requirements for the grant of a temporary interdict. In that regard the applicant must establish a *prima facie* right; an injury actually committed or reasonably apprehended; the absence of

similar protection afforded by any other ordinary remedy and the balance of convenience favouring the grant of the interdict. See *Setlogelo* v *Setlogelo* 1914 AD 221 at 227; *Boadi* v *Boadi* 1992 (2) ZLR 378; *Tribac (Pvt) Ltd* v *Tobacco Marketing Board* 1996 (2) ZLR 52 (S) at 56 B-D.

In my view none of the requirements for the grant of an interdict have been met. The applicant did not even pay half of the purchase price which would have entitled him to take possession of the motor vehicle. *Ms Sibanda* could only produce a photocopy of a schedule showing that only a sum of $4000-00 was paid and signed for and could not produce any other receipts of payment. In terms of the sale agreement the purchase price should have been paid in full within 14 weeks from 10 August 2017. The applicant has not been able to show that he complied with those terms. Therefore he has no *prima facie* right that can be protected by an interdict. There is no legal basis for fettering the rights of the owner to enjoy the benefits of ownership.

If indeed the applicant paid some money towards the purchase of the motor vehicle but could not pay the full purchase price, he has an alternative remedy. He should claim a refund of what he paid. It matters not that he has instituted summons action as it may not even succeed. It occurs to me that no injury can be suffered by the applicant if the respondent deals with what belongs to her as she pleases in the circumstances. The balance of convenience favours her.

I have said that in circumstances where a litigant withholds vital information, where an urgent application is punctuated by material non-disclosures and half-truths and or falsehoods this court will always penalize such a litigant by awarding punitive costs. This is done in order to discourage such dishonesty and as a seal of the court's disapproval of such conduct.

In the result the application is hereby dismissed with costs on a legal practitioner and client scale.

Vundhla-Phulu & Partners, applicant's legal practitioners
Tanaka Law Chambers, respondent's legal practitioners