CHIPO CHRISTIAN GARAPO
versus
FORBIAS NYERERE
and
BRIGHTON
and
REGISTRAR CENTRAL VEHICLE REGISTRY
and
THE MINISTER OF HOME AFFAIRS

HIGH COURT OF ZIMBABWE
BACHI-MZAWAZI J
HARARE 7 April 2022 & 18 May 2022

Opposed Application

Z.Dumbura, for the applicant
F Masarire, for the second respondent
K.Munatsi, for the 3rd and 4th respondent
No appearance for the first respondent

BACHI MZAWAZI J: On the 28th of November 2019 applicant and the first respondent entered into an agreement of sale of a motor vehicle, Land Rover Discovery Engine number 03255292276DT, Chassis number SALLAAA138A491750 for the sum of US$10 000,00, United States ten thousand dollars. The vehicle in question, is alleged to have been imported by the second respondent and given to the first respondent to sale on his behalf. At the conclusion of the sale transaction, delivery of the vehicle itself, the ignition keys alongside the accompanying original documents consisting of the Customs clearance certificate, declaration and Customs payment receipts against the payment of the agreed purchase price, was effected to the applicant by the first respondent. The Customs documents still reflect the name of the importer who is the second respondent.

Somehow, the second respondent reported the same vehicle stolen resulting in its blacklisting by the relevant authorities. He claimed that he had not authorized the sale or disposal of the said vehicle. Consequently, the police investigated the matter and resolved that there was no theft and that the second and first respondents had issues revolving around the non-remittal of

the purchase price to the owner of the vehicle in issue. The black listing meant that the third respondent forestalled all procedures pertaining to the registration of the car pending the outcome of police investigations.

Since the police, who are the fourth respondents herein, had played their part in that regard, they wrote two letters appraising both the third and second respondents of their findings and instructing the third respondent to un-black list the vehicle under contention. The first letter was dated the 30th of November 2020 and the second on the 5th of May 2021, both addressed to the third respondent copied to the second. In both letters, the fourth respondents stated that their investigations did not reveal any theft of the vehicle under scrutiny but that there was a verbal mandate given to the first respondent to sale the vehicle. They also discovered that, the main source of dispute was the failure by the first respondent to account for the money he had received for the vehicle when requested to do so by the second respondent.

It seems like the efforts by the fourth respondent to have the vehicle unblacklisted did not yield any results compelling applicant to rope in the assistance of his legal practitioners. In turn, the legal practitioners wrote to the third respondents asking them to unblacklist the vehicle in issue, so as to pave way for the subsequent registration into applicant's name, as it had been exonerated from the theft allegations. Again, there was no response or reaction from the intended recipients of the letter. This prompted the launching of this application by the applicant against all the respondents.

Applicant submits that he, through the combined efforts by the fourth respondents and his legal representatives, chronicled above, has exhausted all possible avenues open to him. In that regard he seeks the intervention of this court through a compelling order. He equates the essential elements of such a relief to those of an interdict. Relying on the cases *of Airfield Investment (Pvt) Ltd* v *Minister of Land and others 2004* amongst other authorities, he stated that he has a clear right, evidenced by the agreement of sale filed of record, the original vehicle documents from the port of entry and the fact that he took delivery at the conclusion of the sale transaction after paying the stipulated price. He further asserts that, he was satisfied that the first respondent had the mandate to dispose of the vehicle in issue, as there is no tangible explanation given then and now by the second respondent as to how he came to be in possession of all the above. In addition, the applicant postulates that the police who had initiated the black listing of the vehicle under

contestation have made several efforts to put in motion the mechanism under which the vehicle is to be removed from the blacklist as detailed herein. Applicants advert that the first respondent has since deposed to an affidavit before this court which has not been effectively controverted by the second respondent.

In respect to the aspect of injury actually committed, or reasonably apprehended, applicant contends that the whole process of making an allegedly false report of theft knowing that it was borne out of disgruntlement, resulting in the suspension of the registration of the vehicle, in the face of documentary evidence that the applicant did purchase the vehicle is an injury actually committed. Finally, the applicant asserts that there is no alternative remedy other than an order of this court as he has exhausted all those available to him.

The first respondent, in his opposing affidavit filed of record stated that, indeed he was given a verbal mandate to dispose of the vehicle as well, as all the original documents accompanying the vehicle as already specified herein. He also adds that he then sold the vehicle to the applicant as per the verbal instruction by the second respondent. However, the first respondent did not appear at the hearing to give for *viva voce* evidence and to support his averments.

Counsel for the third and fourth respondents at the hearing abided by their submissions filed of record. In fact, the fourth respondent argued that there was no cause of action against them as they did their part as illustrated by the criminal investigations they made when a report of theft was made by the second respondent. In tandem with their duties they instructed the third respondent, the Central Vehicle Registry, who are responsible for the registration of all vehicles to black list the said car pending the outcome of the their investigations. The fourth respondent, the police, state that, after clearing the vehicle and the transaction surrounding its purchase from theft allegations, have since endlessly endeavored to have the same blacklist reversed to no avail. It is on this basis that they state that they have no case to answer as their position has been very clear from the onset.

A point *in limine*, that there are material disputes of facts was raised by the second respondent in his opposing papers filed of record. He stated that there are disputes of facts that need ventilation through a trial. He denied giving a mandate for the sale of his vehicle to any one let alone the first respondent. The second respondent adverted that the vehicle is registered in his

name and the agreement of sale made reference only to the first respondent and the applicant, meaning that there was need for a power of attorney empowering the first respondent to act on his behalf as the vehicle papers clearly bore his name. In his submissions, the second respondent argues that, proof of the mandate to sell the *merx* in question, should have been produced since the sale was not done with the involvement or the approval of the registered owner. In that regard, the second respondent argues that the applicant has no right to the vehicle. The second respondent argues, further, that there is no actual injury that has been perpetrated on the applicant as he entered into an agreement of sale with the wrong person. He argues that even if there is some injury in regard to the money paid by the applicant, it was self inflicted as the applicants did not confirm or check for power of attorney in a transaction involving the rights of a third party. They concluded by stating that there is an alternative remedy open to the applicant to sue for damages from the person who sold them the vehicle , the first respondent.

In light of the above submissions two issues have emerged. These are:

(i) Whether or not there are disputes of facts

(ii) Whether or not the applicant is entitled to the relief sought

On the first issue, the existence of a material dispute of fact, the second respondent's oral submissions did not differ much from those in their opposing papers. They impressed on the need to proceed to trial to enable evidence to be led on whether or not a mandate to sale the vehicle existed between themselves and the first respondent. They argued that it was illogical that they would sanction a purchase price well below the costs they incurred in importing, the vehicle as well as the amount they had bought it for. From their point of view, that issue was irresolvable on paper but through the leading of oral evidence. In support of their argument they cited a plethora of South African decisions including the cases of *Room Hire Company (Pvt) Ltd* v *Jeppe Street Mansions (Pvt) Ltd* 1949(3) SA 1155

Responding to the preliminary objection, the applicant argued that there is no dispute of fact warranting referral of the matter to trial. They submit that, it is easy for the court to address and deal with the issue of mandate from the papers filed of record. Applicant submits that the papers accompanying the vehicle, the vehicle and the car keys where in the possession of the first respondent. They further argue that, from the papers filed of record, including the second

respondent's heads of argument, it is clear that he has failed to explain how the first respondent came to be in possession of all those items at once. In addition, they assert that the police investigations embodied in the letters from the fourth respondents, speak to the existence of a verbal mandate to sale the vehicle in question. That being the case, they submit that there is no dispute of fact as there is no law that says a mandate should only be in writing. From their perspective, entrusting the first respondent with the vehicle, ignition keys and attendant documents is clear evidence of a mandate and that mandate suffices to be the power of attorney. They urged the court to take a robust and common sense approach and resolve the matter and alleged facts in contention on the basis of the papers before them.

In order to answer the question of the existence of a material dispute of fact, the question that emerges from the facts is whether or not the second respondent had a mandate or authority to dispose of the vehicle in the manner he did? In other words can the matter be referred to trial on that aspect or this court can adequately determine that issue on the evidence on the record before it.

In that regard, there is need to determine, what can be termed disputes of facts. These have been clearly pronounced in the case of *Supa Plant Investment (Pvt) Ltd* v *Chidavaenzi* 2009 (2) ZLR 132. It wherein MAKARAU JP (as she then was) remarked that,

> "A material disputes of facts arises when material facts alleged by the applicant are disputed and traversed by the respondent in such a manner as to leave the court with no ready answer to the disputes between the parties in the absence of further evidence".

The learned judges of Appeal in the case of *Sibonile Dube* v *Paul Murehwa and another* SC68/21,making reference to the case of *Eddies Pfugari (Pvt) Ltd* v *Knowe Residents Association and Another,* SC37/09, noted that,

> "in motion proceedings a court should endeavour to resolve the dispute raised in affidavits without the hearing of evidence. It must take a robust and common sense approach and not an over fastidious one; provided that it is convinced that there is no real possibility of any resolution doing an injustice to the other party concerned."

In *Muzanenhamo* v *Officer in Charge CID Law and Order & Ors* CCZ 3/13, PATEL JA, noted the following

> "As a general rule in motion proceedings, the courts are enjoined to take a robust and common sense approach to disputes of fact and to resolve the dispute on the papers."

Being guided by the above authorities I am of the view that there will be no prejudice on the part of the respondents if this court takes a robust stance and decide the matter on the papers before it. In the present case, the second respondent's grounds for raising the initial objection is that, there is no evidence that has been led that, there was a mandate given to the first respondent to sell the vehicle in question and to enter into the ensuing sale transaction with the applicant. They propounded that a mandate to sale should be in writing not verbal therefore oral evidence to show proof of such authorization should be led.

From that perspective, there is need to define what a mandate is. In simple terms a mandate is an instruction or, directive authorization or order given by one to the other to do something. The Legal Dictionary –Wikipedia, states as follows;

> "There is no particular form or manner of entering into the contract of mandate, prescribed either by Common or Civil law, in order to give it validity. It may be verbal or in writing, it may be expressed or implied and it may be in solemn form or in any other manner." See, *Woods Civil Law* 242.

Relying on the above statement, it is clear that a mandate need not be in writing. There is no hard and fast rule that it has to be, for as long as the parties are in *ad idem* then reducing a contract of that nature to writing is optional but not binding. See *Guoxing Gong* v *Mayor Logistics (Pvt) Ltd & Anor* SC 2/17 and *Infrastructure Development Bank* v *Engen Petroleum Zimbabwe (Private) Limited* SC 16/20. Having noticed that, an analysis of the papers on record reveals that the first respondent was in possession of not only the vehicle in question but its original documents. This fact has not been disputed. It is how the first respondent came to be in possession of the same that has not been addressed by the second respondent. In other words, it is common cause that the second respondent is the owner of the vehicle in issue. From the records emanating from the Customs office issue, it is registered in his name. There is no evidence on record that the second respondent reported, that the first respondent stole his vehicle and all the documents mentioned therein. In his papers the second respondent did not place the court in his confidence as to how these items and property came to be in the possession of the first respondent. Applicant alluded, to an existing relationship between the first and second respondent but the second respondent did not bother to address that point. He either admitted or denied any relationship between the two.

At the last stages of the hearing, the respondent introduced a new dimension that the second respondent was a middle man sent to bring into the country the imported vehicle. In my view this

is an afterthought as it was neither pleaded nor is it a point of law that can be raised and introduced at any stage of the proceedings. See *Allied Bank Ltd* v *Dengu & Anor* SC 58/18 and *Elion Investments (Pvt) Ltd* v *Auction City (Pvt) Ltd* SC 29/16 and *Zimbabwe School Examinations Council* v *Mukomeka (on behalf of minor Charmaine Mukomeka) and Anor* SC 10/20. Discernible from, the facts, at hand is, that there was a voluntary surrender of the documents and the vehicle to the first respondent. In the absence of any relationship of any sort the only logical conclusion is that the vehicle and the accompanying documents were handed to the second respondent with a specified mandate. The police also did their investigations and in their report concluded that there was a mandate to sale.

That being so, this court is convinced that there was a mandate to sale the vehicle based on the fact that the second respondent could not entrust his property to a total stranger without any contractual relationship. This position is buttressed by the official documents from the police to the third respondents copied to the first respondent and also supported by the first respondents own opposing papers. *Afritrade International Limited* v *Zimra* SC3/2021, speaks to the presumption of validity of documents emanating from public office. Where it was held that,

> "… The court a quo was very much alive to the presumption of regularity attaching to the bills of entry .It accepted that those bills were "public" documents whose contents are *prima facie* correct. ."

What can be deduced from the above *dicta* is that if applied to the facts of this case. The two letters are admissible evidence as their source is an official source. Evidently, the agreement of sale between the first respondent and the applicant has not been challenged.

It thus follows that the contract of sale was validly concluded between them as illustrated by the delivery of both the vehicle and its ignition keys as well as the customs entry documents. A contract of the sale of the said vehicles was well concluded and ownership of the same passed. The purchase *pretium* was paid for and the *merx* delivered. See *Mwerenga* v *The City of Harare Department of Housing and Anor* HH 262/21 and *Hativagone & Anor* v *CAG Farms (Pvt) Ltd* CSC 42/15.There are no criminal investigations pending against the applicant nor the first respondent.

Thus, I am convinced that there was a verbal mandate to sell the vehicle in question at the amount it was disposed for. From the facts and evidence led, there are no material dispute of facts but an issue of sour grapes after the second respondent did not receive the purchase price from the

first respondent. Any other amount mentioned by the second respondent as the actual current value of the motor vehicle has not been pleaded and no proof to that effect adduced.

I am satisfied that, the applicant has established an actual right of ownership of the vehicle emanating from the sale. The black listing has evidently caused an injury actually inflicted and is continuing until that position is reversed. The fact that the other respondents have refused to comply with the fourth respondent's instructions to free the vehicle leaves the applicant with no other remedy other than to get an order from this court. In that regard the requirements of a mandamus interdict have as stipulated in the *locus classicus* case of *Setlogelo* v *Setlogelo* 1914 AD 221, been met. In principle these are, a clear right, injury actually inflicted and the absence of an alternative remedy.

It has already been indicated that the fourth respondent has already played its role by initiating the process to have blacklisting of the vehicle under contention reversed. Ordering them to do what they had already done will be superfluous. That being so, the third respondent did not deny receipt of the letters from the fourth respondents that entailed that the black listing of the vehicle in issue be reversed. I see nothing that should stop this court in ordering them to un-blacklist the vehicle. However, the registration from the second respondent's name to that of the applicant needs the involvement of the second respondent as his personal details and documents are needed to facilitate that process. The third respondent cannot simply transfer the vehicle at the exclusion of the registered owner.

As a result it is ordered that:

1. The third respondents, be and hereby ordered to complete all the processes pertaining to the un-blacklisting of and the registering of the vehicle, namely, Land Rover Discovery 3, Engine number 03255292276DT, Chassis number SALLAAA138A491750, within 48 hours the receipt of this order.

2. The first and second respondents, must avail themselves or their designated agents and to sign the necessary documents for the registration of the same vehicle.

3. Costs will follow the suit.

Zimbudzi and Associates, applicant's legal practitioners
Bherebende Law Chamber, first respondent legal practitioners
Tendai Biti Law, second respondent's legal practitioners
Civil Division of the Attorney General, fourth respondent's legal practitioners