TALKMORE CHIGEZA
versus
ASSISTANT COMMISSIONER MVERE
and
CHIEF SUPERINTENDENT NYAMUPAGUMA
versus
DETECTIVE INSPECTOR JACHI
and
DETECTIVE INSPECTOR NYONI
and
OFFICER IN CHARGE MUTARE MAIN CAMP
and
COMMISSIONER GENERAL OF POLICE

HIGH COURT OF ZIMBABWE
MATHONSI J
HARARE, 10 and 24 September 2014

Opposed application

T. Maanda, for the applicant
Ms *T.Musangwa*, for the 1st, 2nd, 3rd,4th & 6th respondents

MATHONSI J: The applicant seeks, by court application, what is effectively spoliatory relief. In fact, Mr *Maanda* who appeared for the applicant stressed that the application is for a spoliation order directing the respondents to return a Honda Fit motor vehicle registration number ACV2829 and an unregistered Mercedes Benz Sprinter motor vehicle engine number 64698651 S77968 and chassis number WDB9066552 S303889 which vehicles were seized in the course of criminal investigations conducted by the police which resulted in charges being preferred against one Mudassar Khan alias Guddu.

In support of the application the applicant swore to an affidavit stating that he has been employed by Mbada Diamonds in Chiadzwa Marange since 2009. On 22 March 2014 he was invited by the police to take them to his homestead in Bocha where he was made to collect the Honda Fit motor vehicle registered in the name of Charles Gonzo but was kept at his homestead. He was taken to Murahwa Building in Mutare where he saw his "colleagues" being tortured by the police.

The police asked him about the Honda Fit and the Mercedes Benz Sprinter and he told them that the 2 vehicles did not belong to him. He explained to the police that he had

possession of the Mercedes which belonged to one Charles Gonzo as he was test driving it with a view to purchasing it if it suited his needs. The police put it to him that the Mercedes had been bought for him by one Mudassar Khan after he had sold diamonds to Khan and that he had sold diamonds to Khan on 6 occasions.

One the police officers threw a brick at him hitting his feet and causing pain forcing him under duress, to admit what was being suggested to him. His statement was recorded, which he did not bother to read but signed it all the same. The two motor vehicles were then seized from him under those circumstances. He maintains that he does not own them insisting that they were unlawfully taken from him thereby depriving him of their use and possession. Before their seizure, he was in peaceful and undisturbed possession which *status quo ante* he would like restored by order of this court.

The applicant stated that he was forced by the police to incriminate Khan and "unwrittingly" himself. Although maintaining that the vehicles do not belong to him, at paragraph 24 of the founding affidavit, the applicant sharply contradicts himself when he says:

> "I am not a witness against Khan although they recorded what they called a statement. If they want to charge him they should look for competent witnesses and not force me to testify against him. If I am a witness I do not believe that I would have been tortured and kept under inhuman and degrading conditions and my vehicles would not have been seized. Any statement, confession or admission, even of a suspect given under the conditions under which I was held would surely not be admissible against the suspect. I do not believe that a statement extracted from me in the circumstances above can be useful against anyone in court and it is also a wonder how I may be then compelled to testify in court against Mudassar Khan on the basis of a statement I did not author or freely and voluntarily gave. I will have no testimony to give against Mudaasar Khan." (The underlining is mine)

Of course the torture that applicant is referring to is being told by his colleagues who had been at Murahwa Building before him that "they had been visibly tortured." He is also referring to a brick that he says was thrown at him which hit his feet. His vehicles that he refers to are the same Honda Fit and Mercedes Benz Sprinter he says belong to Charles Gonzo. Simply amazing if not totally confusing.

But then more light is shone in the opposing papers of the respondents. In his opposing affidavit, the second respondent, who is the investigating officer in the matter, helpfully explains that the applicant is in fact a witness in a criminal case against Mudassar Khan, Mutare CR349/3/14, DR63/3/14 and CRB1081/14. He states that the applicant sold some diamonds to Khan who would then pay through the purchase of motor vehicles for the

applicant using a Charles Gonzo as an agent. The vehicles were then a token of appreciation or payment or the diamonds sold illegally. This explains why the vehicles are in the name of Charles Gonzo.

The second respondent denies that any threat or undue influence was brought to bear upon the applicant before he gave a statement to the police which statement is telling indeed. As far as the respondents are concerned the applicant is simply a recalcitrant witness now bent on protecting a criminal. The 2 vehicles were seized and are being held as exhibits in the criminal courts, there to be disposed of at the conclusion of the trial according to law. The police acted lawfully in seizing the articles which are required for the successful prosecution of Khan on charges of illegally dealing in precious stones.

On 24 March 2014, the applicant swore to an affidavit statement which reads in part as follows:

> "I Talkmore Chigeza national registration number 42-212296E75 do hereby make oath and swear that;
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> 1. I am a male adult aged 29years, residing at number 5002 Magamba, Rusape. I am employed by Mbada Diamonds, Chiadzwa as a sorter.
> 2. I know the accused person Mudassar Khan alias Guddu not only in connection with this case. I had known him before as an illegal diamond dealer in Chiadzwa and I used to supply him with diamonds.
> 3. ----------.
> 4. The accused came to the hospital and he gave me $50-00. Whilst at the hospital the accused told me that he had a surprise for me. I asked him what type (of) surprise it was and thus (*sic*) when he revealed that he had bought a car for me. He pointed out that he had done so because he wanted me to supply him with diamonds as I was a sorter at Mbada Diamonds.
> 5. Whilst we were still at the hospital, the accused called one Charles Gonzo instructing him to bring the vehicle. Charles Gonzo came driving a Honda Fit registration number ACV 5829 silver in colour. The accused gave me the car keys together with the registration book which was in Charles Gonzo's name stating that the Honda Fit was the surprise as he had mentioned before. I then drove the vehicle home.
> 6. ----------.
> 7. ----------.
> 8. In December 2013, I sold him another parcel comprising of 4 pieces which he paid for $3 700-00. It was on this date when the accused told me that he wanted to buy me a Benz Sprinter as he had been pleased by the manner in which I was supplying him with diamonds.
> 9. At the end of December 2013 the accused told me whilst at his residence that he had finally deposited money for the sprinter for me through Charles Gonzo's agent from United Kingdom.
> 10. ---------.

13. At the end of February 2014, the accused called me stating that the vehicle he imported for me had finally landed and as such Charles Gondo (*sic*) had gone to collect it at Beitbridge Border Post.
14. Upon arrival from the Beitbridge Charles Gonzo drove the vehicle to his residence. I was then called by the accused who advised (me) to go and collect my car at Charles Gondo's residence. He however emphasised that I should further work hard in supplying him with diamonds so as to maintain the good friendship.
15. I went to Charles Gonzo's place and collected the vehicle on 15 March 2014. The vehicle import papers were in Charles Gonzo's name. I then drove the vehicle to my residence in Rusape pending registration."

No wonder why the applicant has failed to take a clear position on the vehicle and little wonder as well that he now so frantically wants to disown the witness's statement he gave to the police. The statement is an indictment on its own and probably contains more of the truth than his founding affidavit in which he dithers from saying the vehicles do not belong to him to unwittingly claiming they are his. He ought to make and election. It is either the vehicles are his or they are not. He cannot have it both ways.

The state is entitled to seize articles which, on reasonable grounds, are believed to afford evidence of the commission of an offence. In fact s49 of the Criminal Procedure & Evidence [*Cap 9:07*] provides:

"The state may, in accordance with this Part seize any article-
(a) which is concerned in or is on reasonable grounds believed to be concerned in, the commission or suspected commission of an offence, whether within Zimbabwe or elsewhere; or
(b) which it is on reasonable grounds believed may afford evidence of the commission or suspected commission of an offence whether within Zimbabwe or elsewhere; or
(c) which is intended to be used or is on reasonable grounds believed to be intended to be used in the commission of an offence."

Ms *Musangwa,* for the respondent submitted that the police had reasonable grounds to seize the 2 motor vehicles which were premised on the fact that they were proceeds of illegal dealing in diamonds. The criminal prosecution is still to take place and it is only at the end of it that the court may issue a disposal order in respect of s61 of the Act. To ask the court to do that now before the trial amounts to asking the court to interfere with the proceedings of the criminal court. I agree.

Mr *Maanda* for the applicant did not address that point at all. To him it should be enough that the applicant has alleged torture which resulted in the making of the statement he is now disowning. As long as the statement was forced on the applicant, the seizure of the

vehicles on the strength of that statement amounts to spoliation. The applicant's possession should therefore be restored. I have serious difficulties with that kind of reasoning.

The requirements for spoliatory relief are two fold and have to be established for a spoliation order to be granted. They are:

(a) that the applicant was in peaceful and undisturbed possession of the property.
(b) that the respondents deprived the applicant of the possession forcibly or wrongfully against his consent.

See *Botha & Anor* v *Barrett* 1996 (2) ZLR73 (S) 78C; *Kramer* v *Trustees, Christian Coloured Vigilance Council* v *Grassy Park* 1948 (1) SA748(C) at 753; *VandenBerg & Anor* v *Lang* 2010 (1) ZLR 469 (H) 472H; 473 A.

A respondent in an application for spoliatory relief can succeed in opposing it by raising essentially 2 defences namely that:

(a) the applicant was not in peaceful and undisturbed possession of the thing in question at the time of deprivation; or
(b) the respondent has not committed spoliation.

In respect of the second defence, the respondent may for instance prove that his act of dispossessing the applicant was in fact lawful in that it amounted either to a counter spoliation or was justified in terms of some or other statutory enactment or took place with the consent of the applicant. See Silberberg and Schoeman, *The Law of Property* (2nd Ed by DG Kleyn, A Boraine and Wdu Plessis) at p138 and *Van den Berg & Anor*, *supra*, at 473 B-D.

In the present case, while the applicant has been able to prove possession and deprivation, I take the view that the respondents have succeeded in raising a defence based on some statutory enactment rendering the deprivation lawful. In that regard I have already made reference to s49 of the Criminal Procedure & Evidence Act [*Cap 9:07*] which allows the state to seize property reasonable suspected of being connected with the commission of an offence, or reasonable believed to be able to afford evidence of the commission of an offence.

The respondents allege that the applicant illegally sold diamond to a suspect who is being prosecuted. He was rewarded with the 2 motor vehicles he is now claiming. He gave an unequivocal statement under oath confirming those facts and is probably lucky that he is not being prosecuted himself but is being used as a state witness. The vehicles are needed for use during the criminal prosecution as exhibits. It is only at the end of that prosecution that the criminal court will issue a disposal order in terms of s61 (1) of the Criminal Procedure &

Evidence Act [*Cap 9:07*]. The applicant's approach to this court is pre-mature and if entertained would be an unjustified interference with the criminal prosecution.

I do not consider it necessary to deal with the applicant's claim that he was tortured to give the statement for the simple reason that its an issue that I cannot resolve on affidavits. There is a need for *viva voce* evidence to be led on that issue before the appropriate court before it can be resolved.

In the result, the application is dismissed with costs.

Messrs Maunga, Maanda & Associates, applicant's legal practitioners
Civil Division of the Attorney General's Office, 1st, 2nd, 3rd, 4th & 6th respondents' legal practitioners