

**MPILO SVOMHO**

**Versus**

**CHIMUMOYO BAYA**

**And**

**INSEPECTOR CHIRUME – OFFICER-IN-CHARGE,  
DONNINGTON POLICE STATION**

**And**

**ASSISTANT INSPECTOR RUSINGA, DONNINGTON POLICE STATION**

**And**

**COMMISSIONER GENERAL OF POLICE**

**And**

**CO-MINISTER OF HOME AFFAIRS**

IN THE HIGH COURT OF ZIMBABWE  
KAMOCHA J  
BULAWAYO 17 JUNE 2011 & 6 SEPTEMBER & 1 NOVEMBER 2012

*T. Muganyi* for applicant  
*N. Tachiona* for 1<sup>st</sup> respondent  
No appearance from 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup> & 6<sup>th</sup> respondents

Opposed Court Application

**KAMOCHA J:** On 27 January 2011 the applicant sought and was granted a provisional order whose interim relief was as follows:-

“That pending the finalization of this matter applicant is granted the following interim relief:-

- 1) That 2<sup>nd</sup> and 3<sup>rd</sup> respondents be and are hereby, immediately after being served with this provisional order, interdicted from removing custody of the motor vehicle,

- Mazda 626 Capella, registration number AAE 2801 from applicant until the finalization of this matter.
- 2) That applicant be and is hereby ordered to avail the said motor vehicle to the police for any further reasonable investigations, if any, and he is hereby ordered not to dispose of it.”

The terms of the final order sought were these:

- “(a) that applicant be and is hereby declared the rightful and sole owner of the said motor vehicle, a Mazda 626 Capella, registration number AAE 2801; and
- (b) the 1<sup>st</sup> respondent shall bear the costs of this application at an attorney and client scale.”

The circumstances giving rise to this case according to the applicant were these. On 8 December 2010 one Albert Zvopera phoned him and informed him that one of his workmates was selling a car. He went to Albert’s workplace where he was introduced to one Martin Nyamadzawo – Martin, who was the person selling the car.

Initially, Martin was asking for US\$2 000,00 but the applicant made a counter offer of US\$1 500,00. On being told that someone from Chipps Enterprises had also offered US\$1 500,00 for the car he raised his offer to US\$1 600,00 which was accepted by Martin.

That price was arrived at because the car appeared to be a non-runner; its front suspension and gear box were dismantled. It, therefore, needed special attention for it to go back onto the road.

The applicant tendered the agreed purchase price of US\$1 500,00 to Martin who there and then drafted an agreement on an affidavit form as follows:

“Agreement of sale

I Martin Nyamadzawo I.D. No. 32-0626664 W 32 residing at 5749 Luveve Bulawayo do hereby make oath and state that I have been given powers to conduct vehicle sale on behalf of Mrs C. Baya to Mpilo Svomho of 7548/13 Tshabalala Bulawayo I.D. No. 80-056175 F 80. Amount paid in cash. I promise to surrender the book within seven days.

Total amount paid US\$1 600

Engine No.

Registration No. AAE 2801

Chassis No. GD8P-114016

Model Mazda 626 Capella”

The above agreement was dated 10 December 2010 and was witnessed by Albert Zvopera who swore to an affidavit on 30 December 2010 that he was indeed present when Martin sold the car to the applicant on 10 December 2010. He confirmed that applicant paid the purchase price of \$1 600 to Martin and signed as a witness to the transaction.

It was the applicant’s story that at all material times, Martin made it clear that he was selling the car on behalf of his aunt Chimumoyo Baya the first respondent.

Applicant averred that after paying the full purchase price possession was vested in him although he could not take the car away as it was a non-runner at the time. He then agreed with Albert Zvopera to fix the gear box and the suspension of the car at the sum of \$300,00 which applicant paid. He then left the car in the custody of Albert to effect the said repairs.

Three days later i.e. 13 December 2010 Albert called him and informed him that he had attended to the repairs but had discovered that the car did not have a starter and battery. Applicant then phoned Martin who said he was in Harare where he had gone to collect the vehicle’s registration book and suggested that the applicant should call him the following day. When he phoned Martin the next day he suggested that they meet at his workplace between 1pm and 2pm the following day – 15 December 2010. Applicant proceeded to Martin’s workplace as arranged the following day but Martin did not show up. He tried to phone him but his number was unreachable.

Applicant went to look for Martin at his home but he was not there. His wife confirmed that he had gone to Harare. She filed an affidavit marked as annexure “C” which reads as follows:

“I Thandiwe Nyamadzawo I.D. No. 03-0710117 L 03 residing at 5865 Luveve, Bulawayo do hereby solemnly and sincerely swear/declare the following:

I know Martin Nyamadzawo as my husband. On the 11/12/2010 at about 05:30 hrs, Martin received a call on his cell phone while we still on bed (*sic*) and during their conversation I realized that the caller was a female and she was demanding some money from him, he then answered her saying he had \$1 000,00. After the call I asked

my husband who had phoned then he told me it was Mrs Baya his aunt who he said she had given a motor vehicle to sell on her behalf so she was demanding the money for it. When I got up, I searched his clothes in which I saw a lot of \$100 dollar notes which amounted to \$1 600 and I asked him what it was for, he told me it was the money for the vehicle which he had sold to Svomho Mpilo on behalf of Chimumoyo Baya the lady who had phoned early demanding the whole amount from my husband.”

Martin’s wife also advised the applicant that Chimumoyo Baya worked for Standard Chartered Bank. He went there to see her. When he saw her she asked him if Martin had told him that the vehicle did not have a registration book. On being asked if she knew where Martin was she said she had last spoken to him on the morning of 11 December 2010 and he had promised her that he would be bringing the purchase price he had received from the sale of the vehicle.

Chimumoyo Baya later showed him a text message from Martin on her mobile phone which indicated that Martin would not bring the money on that day as he had promised but would do so on 17 December 2010. On 17 December he went to her workplace where she advised him that Martin had still not come.

In the light of what was happening he decided to go and seek guidance from the police at Donnington since he had not been given any documents for the vehicle he had bought. In the company of Constable Nkomo, he went to summon Baya to the police station where statements were recorded from both of them.

Applicant averred that Baya did not, at any material time, deny that she had given Martin authority to find a buyer for her car albeit she would have preferred a buyer who was a car breaker as she did not have the relevant documents for the vehicle i.e. the registration book.

On 17 December 2010 after the police had recorded statements from applicant, Albert Zvopera and Baya, the applicant was allowed to retain custody of the vehicle. In a dramatic change of events on 21 December 2010 he received a call from Baya’s husband who requested applicant to meet him in town. Applicant went to the meeting place with Albert Zvopera where they found Baya’s husband in the company of two people who claimed to be plain clothes policemen from Njube Police Station. The presence of the two plain clothes police details was designed to instill fear into the applicant.

On 24 January 2011 Baya with her husband went to Donnington Police Station and reported the car as having been stolen. The police fell for that story and began to treat the matter as theft of a motor vehicle.

The police behaviour was difficult to understand in the light of what had taken place earlier on at the same police station. The applicant had even been allowed to have custody of the vehicle.

The respondent's legal representative accepted the above facts as given by the applicant as being correct. She, however, sought to contend that Martin was not her agent and had no mandate to sell her car. She averred that Martin had been her mechanic for a long time. Sometime in August 2010 the car broke down when she was on her way to work. She called her mechanic Martin to attend to the car. That was how the car came to be in the custody of Martin and was at his work place.

The assertion that she had not mandated Martin to sell her car and was, *ipso facto*, not her agent is without foundation when she has accepted the facts as outlined above by the applicant. The applicant said he approached her at Standard Chartered bank where she worked to talk to her about the sale of her vehicle. She was well aware of the sale of her vehicle by Martin. She told applicant that Martin was in Harare but would be bringing the purchase price to her on that day. She even asked applicant whether or not Martin had told him that the vehicle did not have the registration book. Later she informed him that Martin had sent her a text message to the effect that he was unable to bring the purchase price on that day but promised to bring it on 17 December 2010.

Martin was clearly her agent with authority to sell the car. He was, however, a bad agent who decided to run away with the proceeds of the sale of her vehicle. She must look for him and get her money for the sale of her car which he received from the applicant on 10 December 2010 in terms of the agreement of sale.

This is a proper case where this court should make an award of punitive costs. The first respondent authorized Martin to sell her car preferably to car breakers since it did not have a registration book. Martin, however, managed to sell it to the applicant who paid the full purchase price. Martin made her aware that the vehicle had been sold and he had received the full purchase price which he promised to pay her but decided to disappear without doing so.

After failing to locate him she turned around and began to allege that he was not her agent and had no mandate to sell her vehicle. She was simply being untruthful and sought to mislead the court which must express its displeasure to such kind of behaviour by an award of costs on an attorney and client scale.

In the result I would confirm the provisional order granted by this court by issuing a final order as follows:

It is ordered that:-

- (a) Applicant be and is hereby declared the rightful and sole owner of the said motor vehicle, a Mazda 626 Capella, registration number AAE 2801; and
- (b) The first respondent bears the costs of this application at an attorney and client scale.

*Dube-Banda, Nzarayapenga & Partners, applicant's legal practitioners*  
*Legal Project Centre, 1<sup>st</sup> respondent's legal practitioners*