

DAVID DOFO  
versus  
DAIRAI KANOYANGWA  
and  
MAGISTRATE TENDAYI MAHWE  
and  
PROSECUTOR GENERAL  
and  
THE OFFICER IN CHARGE BORROWDALE POLICE

HIGH COURT OF ZIMBABWE  
CHIWESHE JP  
HARARE, 23 November 2016 & 13 September 2017

### **Opposed Matter**

*N. Tsarwe*, for the applicant  
*C. Warara*, for the respondents

CHIWESHE JP: This is an application for rescission of a default judgment in terms of Rule 63 of the High Court Rules, 1971.

The background facts to this application are these. In 2009 the applicant bought a motor vehicle from the first respondent, namely a Toyota Vigo registration number AAX 1850. In 2014 the first respondent alleged that he had not sold his vehicle but that one Tawanda Mavunga had defrauded him of the vehicle. He instituted recovery proceedings in the Magistrates Court under case number CRB 11673/14. The second respondent who presided over the case ordered that the applicant, an innocent purchaser, retains the vehicle and that the said Tawanda Mavhunga restitutes the first respondent in the sum of \$14 000.00 being the value of the vehicle.

Dissatisfied with the order, the first respondent approached this court by way of an application for review of the proceedings in the court *a quo*. The applicant, who was then out of the country, was unable to respond to that application within the time limits set out in the

rules and was consequently barred from filing his opposing papers. When the applicant finally responded it was by way of an application for upliftment of the bar. Pending that application, the first respondent proceeded to set the matter down on the unopposed motion roll and obtained a default judgment. In the present application the applicant seeks rescission of that default judgment. In terms of Rule 63 (2) of the High Court Rules, 1971, the court may set aside a judgment if it is satisfied that there is good and sufficient cause to do so. In ascertaining whether there is good and sufficient cause to set aside a judgment, the court will take into account the following factors: the reasonableness of the applicant's explanation of the default, the *bona fides* of the application and whether the applicant has some prospects of success on the merits. See *Stockhill v Griffiths* 1992 (1) ZLR 172 (S) and *Chihwayi Enterprises (Pvt) Ltd v Atish Investments (Pvt) Ltd* 2007 (2) ZLR 89 (S).

I am of the view that the applicant meets the first two of the above criteria for the following reasons. When he realised that his commitments in South Africa rendered it impracticable to return to Zimbabwe to oppose the application for review, he executed a power of attorney in favour of his wife to prosecute the matter on his behalf. The respondents have argued that in these days of advanced communication systems, the applicant could have responded differently without having to involve his wife. That in my view is neither here nor there – the point being that the applicant did take reasonable and practical steps to defend the matter. In that regard his explanation for the default is reasonable. I also find that the application for rescission is *bona fides*. The applicant was an innocent purchaser. He had possession of the car for a period of 5 years until the first respondent belatedly raised his claim to the motor vehicle. The Magistrate Court had ordered that the applicant retains the motor vehicle and that the first respondent be compensated by Tawanda who had defrauded him. All these factors worked in the applicant's favour. Further, at the time that default judgment was entered, the applicant had filed an application for upliftment of the bar. The first respondent was aware of this fact but nonetheless proceeded to snatch judgment. Thus the applicant always intended to oppose the application for review – his *bona fides* is beyond reproach.

However the applicant has no prospects of success on the merits. One may sympathise with him, an innocent purchaser. He believed that a genuine agreement of sale had been executed. The said agreement is in the format of an affidavit which the first

respondent is alleged to have signed. He is also alleged to have received the purchase price in instalments and on each occasion acknowledged receipt in writing. The agreement and the receipts are filed of record. We now know with hindsight that in all this the first respondent was defrauded by Tawanda who acted as if he had authority from the owner to sell the vehicle. The first respondent as owner can vindicate his property wherever he finds it. It is innocent third parties who may seek compensation from the likes of Tawanda.

The point that is reviewable for purposes of determining whether the applicant has prospects of success on the merits is the order of the trial magistrate authorising the applicant to retain the vehicle and the complainant (first respondent) to look to Tawanda for compensation. Firstly, the trial magistrate did not give reasons why he did not order that the vehicle be returned to its owner or why he made the order he made in the first place. That is a good ground for review, which is likely to be determined in favour of the first respondent.

Secondly, there are at least two provisions in the Criminal Procedure and Evidence Act [*Chapter 9:07*] that could have been applicable to the resolution of the point at issue – namely the fate of the motor vehicle. These are ss 364 and 365.

Section 364 provides:

**“364 Compensation to innocent purchaser of property**

Subject to this Part, where—

(a) a court has convicted a person of an offence involving the unlawful obtaining, possession or disposal of property of any description; and

(b) the court is satisfied that the convicted person disposed of the property for value to another person who had no knowledge that it had been unlawfully obtained or possessed or was being unlawfully disposed of, as the case may be; the court may forthwith award compensation to that other person in an amount not exceeding the value of any consideration which he paid or gave in respect of the disposal of the property to him.

**365 Restitution of unlawfully obtained property**

(1) Subject to this Part, a court which has convicted a person of an offence involving the unlawful obtaining of property of any description may order the property to be restored to its owner or the person entitled to possess it.

(2) For the purposes of subsection (1), where the property referred to in that subsection consists of—

(a) money, the court may order that an equivalent amount be paid to the injured party from moneys—

(i) taken from the convicted person on his arrest or search in terms of any law; or

(ii) held in any account kept by the convicted person with a bank, building society or similar institution; or

(iii) otherwise in the possession or under the control of the convicted person;

(b) fungibles other than money, the court may order that an equivalent amount or quantity be handed over to the injured party from similar fungibles in the possession or under the control of the convicted person.”

The trial magistrate did not say which of the above provisions he relied upon in making the order authorising retention of the motor vehicle by the applicant. In my view whichever provision he may have relied upon the order he made does not seem supportable at law. For that reason I believe that on the merits the applicant has no prospects of success. That being the case, the application for rescission of judgment cannot succeed.

Accordingly it is ordered that the application be and is hereby dismissed with costs.

*Tadiwa & Associates*, applicant's legal practitioners

*Warara & Associates*, 1<sup>st</sup> respondent's legal practitioners