

PATRICK MUTODI  
versus  
MINISTER OF HOME AFFAIRS  
and  
COMMISSIONER GENERAL OF POLICE  
and  
THE OFFICER IN CHARGE CID MFFU GWERU  
and  
THE ATTORNEY GENERAL

HIGH COURT OF ZIMBABWE  
MANZUNZU J  
HARARE, 28 March & 20 April 2022.

### **Court Application**

*F Nyamayaro*, for the applicant  
*D Jaricha*, for the respondents

MANZUNZU J

### **INTRODUCTION**

The applicant seeks an order to compel the release of a motor vehicle, a Ford Ranger, held as an exhibit by the third respondent.

### **APPLICANT'S CASE:**

The applicant 's story is that he received a motor vehicle, a Ford ranger from one Prince Moyo as security for an amount he had paid towards the hiring of a JCB earth machine. This was in 2019. The motor vehicle had a South African registration number. The registration book shows that Esigodini Construction is the registered owner but the title holder is Wesbank Head Office. From the face of the registration book it appears it is a motor vehicle owned by Esigodini Construction on a hire purchase agreement with Wesbank.

Applicant said the vehicle was lawfully in Zimbabwe because of the temporary import permit. Prince Moyo went to South Africa and took long to return. In the meantime, applicant sourced a loan from one Brian Zijena. Applicant said he used the same motor vehicle as security for the loan. Applicant took long to repay Brian Zijena's loan and when he finally paid him, Brian Zijena could not return the vehicle.

Applicant later learnt the vehicle had been seized by the Police in August 2020 on allegations of the same having been stolen from South Africa. At that time applicant learnt the vehicle had Zimbabwean registration numbers.

The applicant without specific reference to any law said the vehicle was to be unconditionally released to him. Two reasons were advanced why there was to be such release. The first one was that no criminal proceedings were instituted and secondly there was no notice within 72 hours of expiry of 21 days of the respondent's intention to continue holding on to the vehicle.

### **RESPONDENTS' CASE**

The respondents' response is that the vehicle was seized from one Mncedisi Dube when information was received that the same was smuggled into Zimbabwe and fraudulently registered. When they verified the vehicle particulars, they realized that it is on the list of stolen vehicles as per Interpol data base.

Mncedisi Dube was issued with an exhibit's seizure confirmation receipt form on 3 August 2020. As part of their investigations Mncedisi Dube implicated Brian Zijena and Brian Zijena implicated the applicant with the story that he bought the vehicle from applicant. Documents are attached to support every averment made which include an affidavit of the applicant confirming selling the vehicle to Brian Zijena.

The respondents demonstrated the fraudulent acts in registering the vehicle in Zimbabwe. They denied the applicant has any right to claim for the release of the vehicle because it was not seized from him.

### **THE LAW**

The question then is, has the applicant established the legal basis upon which the vehicle should be released to him. It only came out in the answering affidavit that the applicant was relying on the provisions of the Criminal Procedure and Evidence Act.

The applicant said there is no probability in the story by the respondents of the vehicle having been stolen. I think the challenge is misplaced because there is more than enough evidence by the respondents towards that probability.

The other issue raised in the heads on whether the vehicle was procedurally impounded should not detain us at all. The vehicle was not impounded from the applicant neither did the applicant raise any impropriety of its impoundment in the founding affidavit.

The applicant relied on s 58A of the Criminal Procedure and Evidence Act [*Chapter 9:07*] (the Act) as authority for the release of the vehicle. The following is what section 58A of the Act says in part;

**“58A Continued retention of seized articles if institution of criminal proceedings is delayed**

**(1) If within twenty-one working days from the date—**

(a) **when an article was seized** and receipt therefor was given (provided that the date shown on the receipt shall be determinative if it is dated later than the day of seizure); or

(b) when a person referred to in section 49(3) receives a receipt for any article previously seized from him or her; no prosecution of an offence in respect of which the seized article is required as an exhibit is initiated, that is to say—

(c) **no summons is issued to the accused person** for the prosecution of the offence; or

(d) **no statement of the charge is lodged** with the clerk of the magistrates court before which the accused is to be tried, where the offence is to be tried summarily; or

(e) **no indictment has been served upon the accused person**, where the person is to be tried before the High Court;

**then the seized article shall** (unless the article in question is one whose possession is intrinsically unlawful) **be returned as soon as possible by the police officer who detained it**, or by any other person acting in his or her stead, to the premises, place, vehicle, vessel or aircraft from which it was removed or, where that is impracticable, be available for collection at such place as the police officer shall direct **the owner or possessor** thereof to go, **unless the police officer earlier, upon at least seventy-two hours’ notice to the owner or possessor thereof, serves upon him or her a written notice of continued retention of the seized article, ...”** (*emphasis is mine*)

I have highlighted part of the section which applicant says is applicable in his case. He says no criminal proceedings were instituted. That there is no notice within 72 hours of the expiry of 21 days of intention to continue holding on to the exhibit. The section however identifies the beneficiary as the owner or possessor. The question is, has the applicant proved that he is such owner or possessor. Certainly not. There is no evidence to show that the applicant is the owner of this vehicle. He too has not proved to be the possessor. He at least claims to be a possessor by virtue of his retention of the vehicle as security, however that assertion is challenged. Applicant admits he relinquished his possession when he surrendered the vehicle to Brian Zijena as security. Brian Zijena says he bought the vehicle from the applicant. The issue of possession is surrounded with serious disputes of fact under which the applicant cannot claim victory at this stage. In any event, as a matter of fact, the applicant has not made a case for the release of the vehicle and his application must fail.

**DISPOSITION:**

The application be and is hereby dismissed with costs.

*Farai Nyamayaro Law Chambers*, applicant's legal practitioners.  
*Civil Division of Attorney General*, respondents' legal practitioners.