

**IN THE COURT OF APPEAL
OF ZAMBIA HOLDEN AT
LUSAKA**
(Civil Jurisdiction)

Appeal No. 23/2020

BETWEEN:

TULANI CHISENGA

AND

**MTN ZAMBIA LIMITED
KEITH KWALELA KHUZWAYO**

CORAM : Kondolo, Chishimba and Ngulube JJAs

On 19th May, 2021 and 27th July 2021



APPELLANT

1ST RESPONDENT

2ND RESPONDENT

For the Appellant : Mr. T.S Milimo of Messrs Kapungwe
Nchito Legal Practitioners
For the 1st Respondent : Mr. S. Chisenga of Messrs Corpus Legal
Practitioners
For the 2nd Respondent : Messrs Legal Aid Board N/A

J U D G M E N T

CHISHIMBA, JA, delivered the Judgment of the Court

CASE REFERRED TO:

1. Abel Mulenga and Others v Mabvuto Adan Avuta Chikumbi and Others (2006) ZR 33
2. Bishopsgate Motor Finance Corporation Limited v Transport Brake Limited (1949) 1 KB 322
3. Lewis v Avery (1972) 1 QB 198
4. Turnkey Properties v Lusaka West Development Company Limited and Others (1984) Z.R. 85.

5. Charles Osenton & Company v Johnson (1941) 2 ALL ER 245
6. Finance Bank Zambia Limited v Dimitrios Monokandilos and Filandria Kouri (2012) Vol. 1 ZR 484
7. Southern Cross Motors Limited vs Nonc Systems Technology Limited 2011/HR/223
8. Water Wells Limited v Wilson Samuel Jackson (1984) Z.R. 98
9. Taribo Holdings Ltd v Storage Access Technologies Inc 2002 Carswell Ont 3811 (Ont .SCJ)
10. BMW Canada Inc v Autoport Limited (ONT CA,20021)
11. Tulani Chisenga v. MTN Zambia Limited and Keith Kwalela Khuzyayo Appeal No. 151/2020 (CA)

LEGISLATION CITED:

1. The Industrial Relations Court Rules, Chapter 269 of the Laws of Zambia.
2. The Rules of the Supreme Court of England (Whitebook) 1999, Edition.

1.0 INTRODUCTION

1.1 This appeal arises from an interlocutory ruling of the Industrial Relations Division of the High Court dated 12th November, 2019, in which the Hon. Mr. Justice Mathew Chisunka (as he then was) joined the appellant to the proceedings as a respondent, in the court below and refused to discharge an order for custody and preservation of an Isuzu KB 300 motor vehicle Registration No. BAB 7754 (herein after referred to as ‘the motor vehicle’). The appeal is in respect of the refusal to discharge the order of preservation of the motor vehicle in issue.

2.0 BACKGROUND

2.1 The facts giving rise to the appeal are that the 2nd respondent commenced an action by way of complaint against the 1st respondent seeking the following reliefs:

- 1) Damages for wrongful and/or unlawful dismissal;**
- 2) Payment for accrued leave days;**
- 3) An order that the motor vehicle BAB 7754 was wrongly taken by the respondent (1st respondent herein) from the complainant (2nd respondent herein);**
- 4) Damages for loss of use of the aforementioned motor vehicle and costs.**

2.2 The 1st respondent, filed an amended answer to the complaint and counterclaimed as follows:

- 1) Payment of a total sum of K703, 685.28 or any other amount found to be due, being the outstanding balance on the Isuzu with model number KB 300 and registration mark BAB 7754 which said vehicle is subject to a Car Lease Agreement that was entered into between the Complainant (2nd respondent herein) and the Respondent (1st respondent herein);**
- 2) Interest on all sums found to be due to the respondent;**
- 3) Legal costs; and**
- 4) Any other relief the court may deem fit.**

2.3 Before trial commenced, the court below granted an application ordering the 2nd respondent to deliver possession of the motor vehicle to the 1st respondent's head office at Foxdale for its custody and preservation until final determination of the matter. The 2nd respondent did not comply with the order of the

court. Subsequently, the appellant filed an application for an order to be joined to the proceedings as an intervener and for an order to discharge the order for custody and preservation of the motor vehicle.

2.4 In her affidavit in support of the applications, the appellant stated that she bought the motor vehicle from the 2nd respondent on 17th March, 2018 prior to the issuance by the court below of the order of custody and preservation dated 25th October, 2018. She exhibited the registration certificate to show that the 2nd respondent owned the motor vehicle and stated that she would be adversely affected by the outcome of the main action and earlier order of custody and preservation. On this basis, she prayed that she be joined to the proceedings as an intervener and that the order for custody and preservation earlier granted be discharged.

2.5 The 2nd respondent did not object to the appellant's applications but was of the view that the appellant should be joined to the proceedings as a party and not as an intervener. Without elaborating, it was submitted that the purported sale of the motor vehicle was fraudulently done.

2.6 The 1st respondent opposed the application and stated that the 2nd respondent obtained the motor vehicle through a car lease agreement between the 2nd respondent and the 1st respondent. A motor vehicle registration certificate was exhibited to show that 'absolute ownership' of the vehicle vests in the 1st respondent with the 2nd respondent listed as 'owner'. The vehicle was never transferred to the 2nd respondent as he had an outstanding loan in respect of the said vehicle in the sum of K703, 658.28.

2.7 The 1st respondent contended that the appellant should be joined to the proceedings, not as an intervener, but as a party so as to enable the trial court make a determination in respect of the dispute in regard to the ownership of the motor vehicle. The application to discharge the order of custody and preservation was opposed on the basis that it is in the interest of justice that it be upheld and extended to the appellant.

3.0 **DECISION OF THE HIGH COURT**

3.1 Judge Chisunka (as he then was) considered the applications before him and was of the considered view that the issues for determination were whether or not the court should grant an

order for joinder of the appellant as an intervener to the action; and whether to discharge the order of custody and preservation.

3.2 With respect to the application for joinder, the learned judge considered rule 32 of the Industrial Relations Court Rules Chapter 269 of the Laws of Zambia and the case of **Abel Mulenga and Others v Mabvuto Adan Avuta Chikumbi and Others** ⁽¹⁾ and found that the appellant had shown sufficient interest to be joined to the proceedings. The learned judge was also satisfied that any final order or judgment relating to the motor vehicle, will directly affect any entitlements, rights or liabilities that may be attached either to the 2nd respondent, 1st respondent or appellant. The presence of the appellant before the court would be necessary to ensure that all matters pertaining to the motor vehicle are completely determined and adjudicated upon. He agreed with the 1st respondent that the appellant must be joined to the proceedings as a party and not just as an intervener.

3.3 With respect to the application to discharge the order of custody and preservation, the court below noted that the appellant had adduced new evidence to the effect that she had owned the motor vehicle since March 2018 and was entitled to enjoy

ownership and possession of it. This evidence brought to the fore the dispute before the court, being ownership of the motor vehicle. Therefore, it was imperative that the motor vehicle, being the subject matter of the action, be preserved until final determination of the action. The court stated that the order for custody and preservation had not been rendered nugatory and as such should remain in force so as to serve its' intended purpose.

3.4 The court below ordered that the appellant be joined to the proceedings as a party and refused to discharge its order of custody and preservation granted earlier.

4.0 **GROUND OF APPEAL**

4.1 Dissatisfied with the decision, the appellant appealed to this court, advancing two grounds couched as follows:

- 1) ***The court below erred in fact and in law when it held that the Isuzu KB 300 being a subject matter of this action must be preserved until a final outcome is reached in this matter when in fact its order dated the 25th October, 2018 which was directed to the 2nd respondent was superceded by the fact that the motor vehicle had already been sold by the 2nd respondent to the appellant who purchased it in good faith before the court order had been issued; and***
- 2) ***The court below erred in fact and in law when it extended the order dated 25th October, 2018 to the appellant without considering the fact that the decision would be prejudicial to***

the appellant in favour of the 1st respondent as the appellant will be deprived of the possession and use of her motor vehicle.

5.0 **APPELLANT'S ARGUMENTS**

5.1 Heads of arguments in support of the appeal were filed on behalf of the appellant on 17th February, 2020.

5.2 In arguing ground one, the appellant invoked the provisions of sections 1, 17(1), 21(1) and 23 of the Sale of Goods Act, 1893 and submitted that she purchased the vehicle from the 2nd respondent upon being shown proof that he owned it. She contended that a motor vehicle registration certificate being conclusive proof of ownership, is the basis upon which she entered into a contract of sale with the 2nd respondent with the result that ownership was transferred to her. She complied with all the legal requirements to effect the change of ownership and register the motor vehicle in her names.

5.3 The appellant further contends that because the motor vehicle was sold to her on 17th March, 2018 prior to the order for custody and preservation dated 25th October, 2018, it followed that the said order was unenforceable and invalid as the subject matter had already been transferred by the 2nd respondent to the appellant. Consequently, the appellant is a bona fide purchaser without notice of any encumbrances or defect in title.

- 5.4 With respect to the car lease agreement subsisting between the 1st and 2nd respondent, the appellant submits that even though absolute ownership of the motor vehicle vested in the 1st respondent at all material times, the fact remains that the 2nd respondent entered into a contract of sale with the appellant resulting in a transfer of ownership to the appellant.
- 5.5 As authority for the above contentions, the appellant cited the cases of **Bishopsgate Motor Finance Corporation Limited v Transport Brake Limited** ⁽²⁾ and **Lewis v Avery** ⁽³⁾ for the principle in commercial transactions that a person who takes in good faith and for value without notice, should get title. It was submitted that this was an appropriate case to discharge the preservation order.
- 5.6 In respect of ground two, the appellant's contention in the main is that it was wrong for the court below to extend the order of custody and preservation to the appellant because the appellant would suffer prejudice. The appellant made reference to the definition of prejudice contained in Baron's Dictionary of legal terms. The appellant submits that the status quo ought to be maintained in that both the appellant and 1st respondent are equal claimants to the motor vehicle which the appellant has

been in possession of since 17th March, 2018 when she bought it from the 2nd respondent. It was argued that the appellant will be deeply prejudiced by the order of the court below as the status quo will shift in favour of the 1st respondent, who is also a claimant of the motor vehicle.

5.7 It was further argued that the order by the court below is prejudicial to the appellant as it seeks to take away possession and use of the motor vehicle from her to the 1st respondent who will then enjoy possession and access to use the motor vehicle to the detriment of the appellant.

5.8 We were urged to reverse the decision of the court below as the lower court misapprehended the law and facts.

6.0 **1ST RESPONDENT'S ARGUMENTS**

6.1 On 23rd March, 2020, the 1st respondent filed heads of argument in response to the appeal and a supplementary record of appeal.

6.2 In response to ground one, the 1st respondent submits that the appellant has no basis in law for contending that the court below erred in holding that the motor vehicle, being a subject matter of this action, must be preserved until a final outcome is reached in the main matter. In the first instance it was argued

that the court below was on firm ground in holding that the vehicle is a subject matter of the main action as evidenced by the notice of complaint, affidavit in support of notice of complaint, the answer and counterclaim, and amended affidavit in support of the respondent's answer in the supplementary record of appeal. It was further submitted that the 2nd respondent admitted that the 1st respondent is the owner of the vehicle and that he had only paid 40% of the total purchase towards the vehicle.

6.3 The 1st respondent further submitted that in its' amended affidavit in support of the respondent's answer, evidence was adduced to the effect that it is the absolute owner of the vehicle and that the 2nd respondent has an outstanding balance of K703, 685.28 on the vehicle as per counterclaim. In this regard, it is clear that there are competing interests in relation to the motor vehicle requiring a full trial to determine the ownership of the said vehicle.

6.4 The 1st respondent contends that the alleged motor vehicle registration certificate and the alleged letter of sale exhibited by the appellant in the affidavit in the court below on record are not conclusive evidence as to ownership. The appellant's claim

that she is a bona fide purchaser of the vehicle with no notice as to any encumbrances or defects in title due to an alleged valid contract of sale between the appellant and the 2nd respondent was vehemently denied, in view of the 2nd respondent's denial of the alleged sale.

6.5 The 1st respondent states that there is no dispute as to the law governing a third party acquiring title from a party that may or may not have title. The court below did not make a determination as to the ownership of the motor vehicle or the letter of sale. This is because the matter is at interlocutory stage where such applications do not finally determine a matter. The definition of interlocutory by Black's Law Dictionary was cited, namely that an interlocutory order does not finally determine a cause of action but decides some intervening matter pertaining to the cause. Reference was made to the case of **Turnkey Properties v Lusaka West Development Company Limited and Others** ⁽⁴⁾ for the principle that an interlocutory application should not be regarded as a device by which an applicant can attain or create new conditions favourable only to himself. The appellant and respondents must prove their claims at trial.

6.6 As regards the argument advanced by the appellant that the custody and preservation order is unenforceable and invalid as ownership of the motor vehicle had already been transferred to the appellant, the 1st respondent submits that this is evidence which the court below had no opportunity to make a determination on. The fact that the appellant made a claim of ownership neither makes the statement true nor entitles the appellant to have the preservation order discharged without proving her claim at trial. In any event, as the 2nd respondent denied the alleged sale, the appellant has to prove her claim of ownership at trial.

6.7 With respect to the extension of the custody and preservation order to the appellant, it was submitted that the court below properly exercised its discretion to extend the preservation order by virtue of Rule 55 of the **Industrial Relations Court Rules** on the power of the court to make such orders as may be necessary for the ends of justice. Therefore, this court can only reverse the order of the court below if the appellant demonstrates that the court below made errors in the judicial exercise of its discretion as held in the case of **Charles Osenton**

and Company v Johnson ⁽⁵⁾ cited in **Finance Bank Zambia Limited v Dimitrios Monokandilos and Filandria Kouri** ⁽⁶⁾.

6.8 In response to the appellant's contention that the 1st respondent sat on its rights in not making a claim towards the motor vehicle at the time of the alleged sale, the 1st respondent submits that this only goes to buttress their position that it is imperative that the question of ownership be determined at trial as this argument was not even raised during the hearing of the application to join as intervener. The 1st respondent contends further that the fact that the motor vehicle is to be preserved at its premises does not prejudice the appellant since the 1st respondent will equally not have use of the vehicle as opposed to the appellant who had continued to flout the preservation order by using the vehicle and refusing to deliver it for preservation.

6.9 In addressing ground two, the appellant contended that the court below did in fact consider the question of prejudice and the claim of ownership in its ruling, and found that the purpose for which the order was granted had not been rendered nugatory in light of the new evidence. It was submitted that the court below considered the interests of all parties involved

including the appellant and did not lean towards one party, and so, cannot be accused of not considering any potential prejudice. Further that the court below had also considered the issue of contested ownership when extending the preservation order. Further that the 1st respondent equally stands to suffer prejudice as absolute owner of the vehicle with an outstanding balance of ZMK 703,658.28 not fully settled by the 2nd appellant. The High Court case of **Southern Cross Motors Limited vs Nonc Systems Technology Limited** ⁽⁷⁾ on the intention of the provisions of order 29 Rule 2 was cited

6.10 In reference to the subsequent ruling of 4th December, 2020 by the court below which granted an interim attachment of the vehicle, it was submitted that the court below found that the appellant was attempting to auction the vehicle sometime in 2019. Therefore, the risk of the appellant disposing the vehicle if allowed to keep it in her possession, is very high. It was contended that owing to the nature and likely depreciation of the vehicle, the preservation order is in the best interests of all the parties.

6.11 In conclusion, the 1st respondent submits that the appeal is frivolous and vexatious, and should be dismissed entirely with

costs as it has been put to great expense and inconvenience. The case of **Water Wells Limited v Wilson Samuel Jackson** ⁽⁸⁾ was called in aid for the principle that where a respondent has been put to great expense and inconvenience all traceable to the appellant's default, even though an appeal succeeds, the costs need not follow the event.

7.0 **THE DECISION OF THIS COURT**

7.1 We have considered the appeal, the arguments advanced and authorities cited. The following facts are not in dispute, that the 2nd respondent is a former employee of the 1st respondent MTN Zambia Limited. Through an arranged car lease agreement, MTN Zambia purchased a motor vehicle registration number BAB 7754 for the 2nd respondent but the absolute ownership remained with the 1st respondent until the full purchase price was paid. The 2nd respondent was dismissed from employment and sued the 1st respondent for damages for an order that the Isuzu KB 33 in issue was wrongly taken from him by the 1st respondent.

7.2 The 1st respondent filed a counter claim for the balance of the sum of K703,000 outstanding on the ISUZU motor vehicle. And further applied for an order of interim attachment of property.

The court below granted the application and ordered the 2nd respondent to deliver possession of the vehicle to the 1st respondent head office for custody and preservation pending determination of the matter.

7.3 The appellant Tulani Chisenga, applied to be joined to the proceedings as intervener and sought to discharge the order for custody and preservation of the motor vehicle. The basis being that she had purchased the vehicle from the 2nd respondent on 17th March 2018 prior to the order of custody and preservation dated 25th October 2018. The court below joined the appellant as a party but described to vacate the earlier order of custody and preservation. It is further not in issue that ownership of the motor vehicle is contested between the appellant and MTN Zambia Limited.

7.4 The issue for determination is simply whether the court erred in law and fact in refusing to discharge the custody and preservation order and whether the appellant was prejudiced by the order in issue.

7.5 The appellant argued extensively that she is a bona fide purchaser without notice of any encumbrances or defect in title and made reference to the **Sale of Goods Act 1893** particularly

sections 1, 17(1) and 23. These arguments relate to the substantive matter pending determination at trial which, at this interlocutory stage, we are precluded from delving into. It is an issue that the lower court will determine i.e. ownership of the motor vehicle between the two competing interests.

7.6 We now revert to the issue of whether the court below properly exercised its discretion by refusing to discharge the interim order of custody and preservation.

7.7 It is trite that a court is empowered to make an interim order for the custody or preservation of property that is either in question in a proceeding or relevant to an issue in a proceeding. It is used to prevent the sale or destruction of disputed property pending the outcome of the litigation.

7.8 The tests in respect of preservation orders which the moving party must establish are as follows;

- (1)** The assets sought to be preserved constitute the very subject matter of the dispute.
- (2)** There is a serious issue to be tried regarding the plaintiff's claim or counter claim to the asset
- (3)** The balance of convenience favours granting the relief sought. We refer to persuasive Canadian

authorities in the cases of **Taribo Holdings Ltd v Storage Access Technologies Inc 2002 Carswell** ⁽⁹⁾ and **BMW Canada Inc v Autoport Limited** ⁽¹⁰⁾

- 7.9 The purpose of preservation orders is to that viable claims are not frustrated by defendants who are prepared to ignore court orders, destroy evidence and or dissipate assets.
- 7.10 The main contention by the appellant is that the court below did not consider that the order of custody and preservation would be prejudicial to her.
- 7.11 The court below considered the issue whether to discharge the custody and preservation order dated 25th October 2018 after joining the appellant as a party to the proceedings. It also considered the evidence by the applicant contending that she owned the Isuzu KB 300 since March 2018 and her entitlement to possession etc. The court below being aware of the disputed ownership between all the parties held that it was imperative that the Isuzu KB 300 being a subject matter of this action must be preserved until a final outcome is reached in the matter. Further that the purpose of the order had not been rendered nugatory and must continue to subsist so that it serves its intended purpose.

7.12 We are of the view that the lower court properly exercised its' discretion by refusing to discharge the custody and preservation order dated 25th October 2018 pursuant to the power to order for the preservation of any property which is the subject matter of the suit until final determination of the dispute as to ownership of the vehicle in issue. The issue of ownership of the motor vehicle is contested. The only way to preserve the property subject of dispute is by an order of preservation so that the suit is not rendered nugatory.

7.13 In **Appeal Number 151/2020 Tulani Chisenga and MTN Zambia Limited and Keith Kwalela KhuZwayo⁽¹¹⁾** the appellant who is also appellant in this matter, had challenged the interim order attaching the motor vehicle Isuzu KB 300, we held in that case that ***“we hold the view that it is sufficient that there was an attempt to sale the vehicle by the appellant and this is a source of concern for potential disposal of the vehicle, hence the necessity of the interim attachment order”***.

7.14 As regards the issue of inconvenience to any party by the order of interim attachment, we held in the above cited case that ***“it was not a question of convenience but one of avoiding***

disposal of property that is subject to proceedings by any party claiming to have an interest in it including the 1st and 2nd respondents who are also legally barred from use and disposal of the vehicle until judgment or any further order of the court.” We proceeded to state that ***“having examined the basis upon which the lower court made the decision to order interim attachment of the subject vehicle, we hold the lower court’s discretion was exercised judiciously ...”***

7.15 As regards the alleged prejudice to the appellant in favour of the 1st respondent, we find no such prejudice will be occasioned as all the parties have been deprived of use of the property until final determination of the matter.

7.16 It is immaterial whether the order of custody and preservation was directed to the 2nd respondent and not the appellant. The fact remains that the court extended the order to the appellant when she applied to discharge the order of preservation. This is because the motor vehicle is a subject matter of the dispute between all the parties to the action and ought to be preserved until final determination of the matter.

7.17 We reiterate that whether or not the appellant bought the motor vehicle in good faith and without notice of any defect in title from the 2nd respondent or whosoever, is an issue for determination at trial. Such issues, that require evidence to be led, cannot be resolved at interlocutory stage. It is on this basis that in **Turnkey Properties v Lusaka West Development Company Limited and Others** ⁽⁴⁾ the Supreme Court guided that:

- (i) An interlocutory injunction is appropriate for the preservation or restoration of a particular situation pending trial.*
- (ii) It is improper for a court hearing an interlocutory application to make comments which may have the effect of pre-empting the decision of the issues which are to be decided on the merits to the trial.*
- (iii) An interlocutory intimation should not be regarded as a device by which an applicant can attain or create new conditions favourable only to himself.*

7.18 By insisting that the order for custody and preservation be vacated, and that the motor vehicle remains in her possession and use when there are serious questions to be resolved among the parties, the appellant is in reality using interlocutory proceedings as a means to establish her claim to the subject-matter of the action. It cannot be overemphasized that the order

for custody and preservation is meant to preserve the motor vehicle pending trial and final determination of the competing claims to it, and not as a means to benefit any one party.

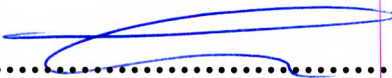
7.19 The order also seeks to ensure that the action is not rendered nugatory and an academic exercise by any one party disposing of the motor vehicle while the dispute is yet to be determined. Indeed, by the appellant's own revelation in her affidavit in support, she became aware of the order for custody and preservation and of the action in the court below when Auction Tace Limited informed her. This shows that the appellant intended to auction the motor vehicle and by so doing, placing it out of the reach of the court. Therefore, an order for custody and preservation of the motor vehicle is vital to maintaining the status quo until final determination of the matter.

7.20 In view of the aforestated, we find no merit in ground one and we dismiss it.

7.21 Having explained the effect of an order for custody and preservation, and further pronouncing ourselves on why the said order was extended to the appellant being a person in possession of the subject-matter of the dispute, we find ground two to be devoid of merit. The argument by the appellant that

she should remain in possession of the motor vehicle and continue using it notwithstanding the clear fact that there is a serious question to be determined regarding its ownership in view of the three competing claims to it, is untenable.

7.22 In conclusion, having found no merit in the entire appeal, we uphold the ruling of the lower court and dismiss the entire appeal with costs to the 1st respondent, in default to be taxed.



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M. M. Kondolo SC


COURT OF APPEAL JUDGE



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F. M. Chishimba

COURT OF APPEAL JUDGE



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P. C. M. Ngulube

COURT OF APPEAL JUDGE