

HAGGIE RAND ZIMBABWE (PVT) LTD

APPLICANT

Versus

CHEMIST GOMBA

RESPONDENT

IN THE HIGH COURT OF ZIMBABWE
DUBE J
BULAWAYO 15 OCTOBER 2024 & 20 FEBRUARY 2025

Application for Summary Judgment.

Mr N. Mashayamobe for the Applicant
Mr B. Sengweni for the Respondent

Introduction.

DUBE J: This is an application for summary judgment. Applicant issued out summons seeking relief in the form of *rei vindicatio* to recover its motor vehicle a Toyota Hilux Registration Number AFK1395 currently in the possession of the Respondent. He entered appearance to defend, and filed his plea. The following facts however became common cause.

1. Respondent was employed by the Applicant as Managing Director in October 1993.
2. He retired on the 30th June 2020 at the age of 65.
3. He received his terminal benefits for that period including his pension.
4. As part of his retirement package he was allowed to purchase a Toyota Hilux Reg. No. ACR3570, in March 2020, in line with the Applicant's motor vehicle policy.
5. Despite receiving his retirement package Respondent continued to work for the Applicant in the same capacity.
6. His post retirement contract was terminated by notice, on the 27th June 2023.
7. He was dismissed.
8. His post retirement stint was only 3 years.
9. Respondent left with Applicant's vehicle now being subject of this claim.

Respondent refuses to hand back that vehicle despite both verbal and written demand. The vehicle is registered in the name of the Applicant. Applicant is without dispute the owner. The Applicant avers that it did not sell the vehicle to Respondent who also does not claim to have purchased it. In fact, at some point Applicant offered to sell the vehicle to the Respondent for a sum of USD40 000.00 which offer he spun. Respondent's arguments are:

- (a) Applicant is obliged per its own vehicle policy to sell the vehicle to him.
- (b) Applicant has in the past sold a vehicle to someone post retirement.
- (c) This is a purely Labour matter and still pending before the labour courts.

Respondent has a very bad defence, if any to a claim of *rei vindicatio*. His only purpose for entering appearance to defend, is to delay the inevitable. Summary judgment is the only appropriate remedy in the circumstances. I shall now demonstrate why.

FACTUAL BACKGROUND.

Respondent was employed by the Applicant as a Managing Director from October 1993 till 30th June 2020. Towards his retirement he wrote an email to his employer seeking to continue employment in the same capacity. The applicant did not confirm nor refuse. Respondent however accepted his terminal benefits and his pension. He was sold his then current issue vehicle being a Toyota Hilux Reg. No. ACR3570 in March 2020, as part of his retirement package. That was in line with Applicant's motor vehicle policy with the following provisions;

“7. PURCHASE OF MOTOR VEHICLE BY USER AT REPLACEMENT DATE AND ON EMPLOYEE'S RETIREMENT.

7.1 The employee shall be entitled to purchase the vehicle allocated to him /her on replacement of the vehicle or on his//her retirement, subject to the employee having completed four years of continuous service. (my own emphasis)

.....

7.2 Employees resigning or dismissed from the Company shall not be entitled to the right of first refusal to purchase the vehicle. Any offer to such employee to purchase the vehicle shall be at the discretion of the Company”

That was despite the Applicant having sold respondent another Mercedes vehicle in February of 2019 i.e, only a year prior, in cognisance of his continued employment for a period in excess of four year per the vehicle policy cited above. By the 1st July 2020 Respondent started a new employment relationship with the Applicant which I shall refer to as the post retirement contract. Since the terms thereof were not mutually discussed, agreed and reduced to writing it means they were implied. The salary grade and the rest of the conditions of service remained the same. For whatever reasons on the 27th June 2023 the Applicant wrote a letter to the Respondent giving him three months' notice to terminate his current contract of employment. He was directed not to work and was paid *cash in lieu* thereof. That is how respondent's employment relationship came to an end.

In his plea to the summons, Respondent contended:

“The plaintiff has no right to claim the vehicle in question as the vehicle is supposed to be sold to the defendant in terms of the plaintiff's motor vehicle policy which entitles the Defendant to buy the vehicle less 25% depreciation per year. The matter is before the ministry of Labour and was referred for arbitration. This is a purely labour issue which the tribunal should be allowed to deal with and conclude.”

I must state that at the commencement of this application, Applicant brought forth an application to file a supplementary affidavit. This application was not opposed and such affidavit and its attachments became part of the record. Of utmost importance is the arbitration award which is by now out. I must say from the content of that award, whatever was left of Respondent's glimmer of hope was extinguished.

The reason being, the arbitrator made three very crucial findings:

- a) That Respondent's first contract of employment terminated when he attained the age of 65.
- b) That he entered into a new post retirement tacit contract.
- c) That the motor vehicle issue was for the sole determination of this Honourable Court.

This remains an extant judgment of the court. Its not rescinded, appealed against nor in any manner set aside. Respondent's contention that by July 2023 he had been in uninterrupted employment since October 1993 falls on its face. For that reason, clause 7 of applicant's vehicle

scheme which requires continuous service of 4 years does not apply. By July 2023 Respondent had been 3 years only on the new contract.

Besides clause 7. 7.2 clearly excludes those employees whose employment is terminated by dismissal. For all intents and purposes Respondent was dismissed. That is why he filed a labour claim of “unfair dismissal”. In light of that he is not entitled to be sold the vehicle in dispute unless and until the Applicant chooses to exercise its discretion in his favour. He cannot arm twist the applicant in any manner as he is attempting to do.

THE LAW

In the matter of *Savanhu v Hwange Colliery Company* SC 8/15_it was held as follows:

“The action rei vindicatio is an action brought by an owner of property to recover it from any person who retains possession of it without his consent. It derives from the principle that an owner cannot be deprived of his property without his consent. As it was put in Chetty v Naidoo 1974 3 SA 13 (A):

It is inherent in the nature of ownership that possession of the res should normally be with the owner, and it follows that no other person may withhold it from the owner unless he is vested with some right enforceable against the owner (e.g, a right of retention or a contractual right).”

It is surprising that Counsel for the Respondent cited the same matter and interpreted it to mean that as long as there is “a motor vehicle policy” then his client is entitled to withhold applicant’s motor vehicle regardless of the circumstances.

In the matter of *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes and Others* 2010(3) SA 454 (CC) (10 June 2009) it was held that;

“There are basically four main defences to a claim of rei vindicatio which are:

- (i) That the applicant is not the owner of the property in question.*
- (ii) That the property in question no longer exists and can no longer be identified*
- (iii) That the respondent’s possession of such property is lawful*
- (iv) That the respondent is no longer in physical control of the property.”*

In the present case Respondent agrees that he is not the owner of the Toyota Hilux registration number AFK 1395, instead that Applicant is, still has the vehicle and its registration

book, meaning it exists and he has physical control over it, he has no lawful excuse to continue holding onto the vehicle.

Costs

The Applicant in this matter prayed for costs on an attorney client scale. Such costs are punitive in nature. This court must therefore exercise its discretion judiciously. I am of the respectful view that the Respondent herein went on a stubborn quest to achieve the impossible. He was in the past properly allowed to acquire motor vehicles through his erstwhile employer's motor vehicle scheme. His act of relentlessly holding onto this particular vehicle is seen by this court as nothing other than an act of greed. Had he seen the light and let go of the property after the Labour Court ruling this court would have differently. After the clear ruling of the labour court it should have dawned on him that he has no defence whatsoever.

I refer to the case of *Mutunhu v Crest Poultry Group (Pvt) Ltd* HH 399/17 where Mushore J held that:

“The defendant has sought an award of damages on a higher scale. It is settled law that the award of costs on an attorney/client scale is likely to be granted if the conduct of the litigant from which such an award is sought amount to an abuse of the court process and that his actions thereby brought additional and unwarranted expenses to the other party”

I find these sentiments to apply aptly in the present matter.

In the foregoing I make the following disposition.

Disposition

1. The Application for summary judgment be and is hereby granted.
2. Respondent be and is hereby ordered to surrender the Toyota Hilux motor vehicle registration number AFK1395 to the Applicant's offices within forty-eight (48) hours of this order.
3. If the Respondent fails to comply with the order in (2) above, the Deputy Sheriff be and is hereby empowered to seize from the Respondent and deliver to the Applicant the Toyota Hilux motor vehicle registration number AFK1395 without notice.

4. The Respondent shall pay costs of suit on an attorney client scale.

Mashayamombe and Company Applicant's legal practitioners
Sengweni Legal Practice Respondent's legal practitioners