

GOMBE HOLDINGS (PRIVATE) LIMITED
and
BITCOIN T/A KUCHI CONSTRUCTION (PRIVATE) LIMITED
versus
JOSEPHY CHITOMBO

HIGH COURT OF ZIMBABWE
MAXWELL J
HARARE, 26 October, 2021 & 12 January 2022

OPPOSED APPLICATION

Advocate Sanhanga, for Applicant
R. Kadani, for Respondent

MAXWELL J

Applicants filed a *rei vindicatio* claim against Respondent in respect of a motor vehicle, a Toyota Avensis registration number AFF 7889. They also sought an order authorizing the Sheriff to recover the said motor vehicle from the Respondent. Applicants also sought an order for the committal of Respondent to prison if he does not return the vehicle as ordered which committal would be until he delivers the motor vehicle or discloses its location.

Point in Limine

At the hearing of the matter *Mr Kadani* raised a point *in limine* to the effect that first Applicant had no locus standi. He submitted that first Applicant does not have a direct and substantial interest in the matter. He pointed out that it confirmed that second Applicant purchased the motor vehicle and that it was delivered on behalf of second Applicant. He further submitted that second Applicant confirmed purchasing the motor vehicle and that it is a sister company to first Applicant. He stated that first Applicant never owned the motor vehicle. He further stated that

the essential question relates to ownership and as first Applicant has confirmed that it is not the owner of the motor vehicle it has no interest in the relief sought. He referred to *Allied Bank Limited v Celeb Dengu & Anor* SC 52/16 and *Ndlovu v Marufu* HH-480-15. He prayed that the matter be determined to the exclusion of first Applicant.

In response *Advocate Sanhanga* objected to the manner in which the point *in limine* had been raised. She pointed out that the issue was not raised in the papers or heads of argument even though it had not arisen subsequent to pleadings. She averred that the issue had always been there. On the merits of the point *in limine*, she submitted that Respondent took possession of the motor vehicle through employment by first Applicant and that the contention is that first Applicant is entitled to be part of the proceedings by virtue of the contractual relationship with the Respondent. She referred to the case of *Stevenson v The Minister of Local Government & National Housing* SC 38/02 which quotes Herbstein and Van Winsen *The Civil Practice of the Supreme Court of South Africa* 4 ed at p 401, where the learned authors, on the issue of *locus standi* to file an application, say at p 364 that it must appear from the application that the applicant has an interest or special reason entitling him to bring the application – that he has *locus standi* in the matter. She pointed out that Respondent had alleged in his opposing papers that he relies on ownership of the vehicle through his relationship with first Applicant. Further that he challenged the termination of his contract of employment with first Applicant and that until that challenge is determined he is entitled to retain the motor vehicle. *Advocate Sanhanga* submitted that it is *mala fide* for Respondent to challenge the *locus standi* of first Applicant when his defence is based on his employment contract with first Applicant.

Mr Kadani submitted in reply that a point of law can be raised at any stage of proceedings and that the prerequisite is that the other party must be given notice. According to him he had satisfied that requirement by notifying counsel for Applicants shortly before commencement of proceedings.

A point of law which goes to the root of the matter may be raised at any time in the proceedings. See *Trustees, Leonard Cheshire Homes Zimbabwe Central Trust v Chite & Ors* 2010 (1) ZLR 631 (H). The question is whether or not the point taken by Respondent if upheld, would dispose of the matter. Clearly it won't as there are two Applicants before the court. In any event, although it is trite that a point of law can be raised at any stage during proceedings that does not

mean that the point of law can be raised anyhow. In order for one to raise a point of law validly at any stage, notice must be given to the other party of the intention to raise the point. *In casu* Respondent's counsel notified Applicants' counsel of his intention to raise the issue a few minutes before commencement of the proceedings. As submitted for Applicants the issue did not arise after pleadings were filed. No explanation was tendered as to why it had not been raised before. I find that it was improper for counsel for Respondent to raise the preliminary point in the manner he did. In addition, there is no merit in it. As submitted for Applicants, Respondent's defence is based on his employment contract with first Applicant. It boggles the mind how he turns around and claims that first Respondent has no interest in the issue. The preliminary point is accordingly dismissed.

Background facts

Respondent was employed by first Applicant as a human resources manager on 1 December 2019. The contract of employment was terminated on 9 September 2020. The second Applicant is a subsidiary of first Applicant. On 18 December 2019 second Applicant bought the motor vehicle in question which was delivered to the Respondent on behalf of the purchaser. Respondent was using the motor vehicle even though his employment contract did not entitle him to the use of a company vehicle. When Respondent left employment, he refused to surrender the motor vehicle. In his view the motor vehicle was purchased for him. Respondent alleged that his employment was terminated unlawfully and he is challenging it. He claimed that until he is declared to have been lawfully terminated, he is entitled to hold on to the vehicle as it is a benefit arising from his employment contract. Applicants disputed that the motor vehicle is an employment benefit as there was no motor vehicle benefit in terms of Respondent's contract of employment. They submitted that Respondent cannot legally hold onto the vehicle citing labour proceedings.

Submissions by the Parties

Applicants submitted that the *actio rei vindicatio* is found in property law and is aimed at protecting ownership based on the principle that an owner shall not be deprived of his property

without his consent. They referred to the case of *Alspite Investments (Private) Limited v Westerhoff & Others* 2009 (2) ZLR 226 in which MAKARAU J (as she then was) stated that; -

“so exclusive is the right of an owner to protect his property that he is entitled to recover it wherever it is found, without alleging anything further than that he is the owner of the property and that the Defendant is in possession of the property. The *actio rei vindicatio* is an action enforceable against the world at large. It is a rule or principle of law that admits of no discretion on the part of a court.”

Applicants also referred to *Musanhi v Mount Darwin Rushinga Co-operative Union* 1997 (1) ZLR 120, *Mashawe v Standard Bank of South Africa* 1998 (1) ZLR 436, *Stanbic Finance Zimbabwe Limited v Chivhunga and Chetty v Naidoo* 1974 (3) SA 13. They submitted that an owner is entitled to recover their property from any person who retains possession of their thing without their consent.

Applicants submitted that second Applicant purchased the motor vehicle in question and as such is the owner. They submitted that the motor vehicle was being used by first Applicant which is the management holding company for the affairs of the second Applicant. They averred that the motor vehicle is still in existence and is clearly identifiable. They further averred that Respondent does not have Applicants’ consent to be in possession, occupation and/or control of Applicants’ property. They referred to the Respondent’s contract of employment and pointed out that it does not provide for motor vehicle use or allowance. They submitted that the requirements of *actio rei vindicatio* have been met and that Respondent does not have any defence to the claim therefore the order in terms of the draft should be granted.

Respondent submitted that the issue for determination is whether or not the Applicants have set out sufficient facts and evidence to sustain a *rei vindicatio* claim against him in respect of the motor vehicle. He also submitted that the application has no merit and should be dismissed with costs on a legal practitioner and client scale. Respondent further submitted that Applicants have simply made bald allegation of their entitlement to the motor vehicle but have failed to tender proof of their alleged entitlement. He stated the requirements of an action for *rei vindicatio* and cited some of the cases cited by Applicants. In addition, he cited *Masudi v Jera* HH 67-2007, *Stanbic Finance Zimbabwe Ltd v Chivhungwa* 1999 (1) ZLR 262, *Jolly v Shannon & Anor* 1998 (1) ZLR 78 and *Sibanda v The Church of Christ* 1994 (1) ZLR 74.

Respondent also referred to Herbstein & Van Winsen: *The Civil Practice of the High Courts and the Supreme Courts of Appeal South Africa, 5th ed, pages 440-441* where the learned authors state that the general rule which has been laid down repeatedly is that an application must stand or fall by the founding affidavit and the facts alleged in it. He also referred to *Bushu v GMB & Ors* HH 326-2017. Respondent submitted that the fact that Applicants may have provided the funds for the purchase of the motor vehicle does not equate to ownership of the motor vehicle. He pointed out that the agreement of sale in respect of the motor vehicle is in Respondent's name and is therefore *prima facie* proof of ownership. Respondent referred on the case of *Majaji v Madondo & Ors* HH 311-2017 in which the appellant insisted that the evidence of the sale agreement and the registration book was *prima facie* evidence that the motor vehicle was appellants'. He pointed out that the Applicants' names do not appear on the vehicle registration book and therefore there is absolutely no proof placed before the court to support their entitlement to the motor vehicle. According to him, in the absence of any proof of ownership by the Applicants, there was no basis upon which he was obliged to comply with the request for the surrender of the motor vehicle which he said belonged to him and was bought in his name. Respondent submitted that the Applicants failed to prove that they are, or one of them is, the owner of the motor vehicle and as such their application for a *rei vindicatio* cannot succeed. He further submitted that the Applicants failed to prove that he is not entitled to possession of the motor vehicle, or that his possession was unlawful. Respondent also submitted that the order sought by the Applicants is vague and can be open to abuse. He stated that the Sheriff of this court is responsible for enforcing orders of this Court and therefore there is no basis upon which the services of the police or any such service providers may be enlisted to enforce the Order if it were granted. He also stated that Applicants had not provided any justification for seeking his imprisonment as imprisonment arises in very exceptional circumstances where other enforcement mechanisms have not been successful. According to him the relief sought is premature and goes to show Applicants' vindictiveness. On that basis he prayed for costs on a legal practitioner and client scale. He opined that Applicants demonstrated extreme vindictiveness and unnecessarily dragged him through the expense of defending the present proceedings. He referred to *Mahembe v Matambo* HB 13/2003 and *Nel v Waterberg Landbouwers Ko-operative Vereeniging* 1946 AD 597 and stated that He has been put out of pocket by having to defend a meritless claim.

Analysis

The question that arises for consideration is whether or not Applicants have satisfied the requirements for *rei vindicatio*. Has ownership been established? It is not in dispute that the purchase price of the vehicle was paid by second Applicant. Respondent alleged that second Applicant may have provided the funds enabling first Applicant to fund its obligation to him in terms of his conditions of service. Whilst in the preliminary point *Mr Kadani* had tried to remove first Applicant from the matter, Respondent, in his opposing affidavit stated that there is no basis for second Applicant to be a party to the present matter. See para 18 of the said affidavit. Respondent believes he is entitled to hold onto the motor vehicle pending a decision on his challenge to the termination of his employment contract. Respondent's contract of employment is on record. It has no motor vehicle benefit or allowance. Respondent sought to rely on a letter dated 2 December 2019 which had a fuel allowance. Unfortunately for him, when he accepted the offer of employment on 5 December 2019, the motor vehicle or even the fuel allowance was not incorporated into the employment benefits available to him. The words of MATHONSI J (as he then was) in *Lafarge Cement (Zimbabwe) Limited v Mugove Chatizembwa* HH 413/18 are apposite. **The learned Judge said;-**

“I have stated before that an employee who has lost employment has no right to hold onto the property of the former employer allocated to him or her by virtue of employment or as a condition of employment merely on the grounds that he or she is challenging the termination of the employment contract. See *Montclair Hotel and Casino* HH 501-15. The point is also made in *William Bain & Co Holdings (Pvt) Ltd v Nyamukunda* HH 309-13 that a former employee cannot lawfully confiscate or hold onto a former employer's property after termination of the employment contract because the right to hold on to the property is extinguished by the termination.

Put in another way, a former employee does not acquire a right of retention as can be used to resist a *rei vindicatio* on the basis of a challenge of a completed dismissal from employment and a forlorn hope that such dismissal may be reversed at a future uncertain date.”

In my view it is inconsequential that the agreement of sale is in his name since he claimed that the motor vehicle was an employment benefit. I find that Applicants have established that the motor vehicle belongs to second Applicant and that Respondent has no right to hold onto it.

The second requirement is for Applicants to establish that the property was in the possession of the Respondent at the commencement of the action, whilst the third requirement is for Applicants to establish that the property which is being vindicated is still in existence and

clearly identifiable. This is common cause. Respondent has not disputed that he is in possession of the motor vehicle. He actually placed it on record that he is holding on to it pending resolution of a challenge to the termination of his employment.

Applicants have made a case for *rei vindication*. They are entitled to the order sought. However, no justification was given, either in heads of argument or orally, for the award of costs on a legal practitioner and client scale. Ordinary costs will meet the justice of the case.

Disposition

The following order is hereby made;

1. Respondent be and is hereby ordered to deliver to 2nd Applicant, the Toyota Avensis motor vehicle registration number AFF 7889 within 24 hours of being served with this order.
2. In the event that Respondent does not comply with paragraph 1 above, The Sheriff is ordered to recover the said motor vehicle from wherever and from whomsoever it be found and deliver same to 2nd Applicant. In the execution of the order, the Sheriff may enlist the services of the Zimbabwe Republic Police, or any other service provider as he may deem necessary.
3. Also, in the event that paragraph 1 above is not complied with, Respondent be and is hereby ordered to fully disclose the location of the motor vehicle failing which he shall be committed to prison until he has complied.
4. Respondent is to pay costs of suit.

Chivore Dzingirai Group of Lawyers, Applicants' Legal Practitioners
Atherstone & Cook, Respondent's Legal Practitioners