

KETTEX (PVT) LTD T/A FEYA FEYA
(Represented by T. Grimmel in her capacity as Liquidator)
versus
JOEL MUGARI

HIGH COURT OF ZIMBABWE
DUBE J
HARARE, 3 March and 14 July 2014

Civil Trial

R. Stewart, for the plaintiff
D. Mazavazi, for the defendant

DUBE J: The plaintiff's action is for a *rei vindicatio*. The plaintiff issued summons claiming the return of a Nissan K03 Pickup vehicle registration number ACG 2965. The plaintiff claims that it is the owner of the vehicle and that it was wrongfully deprived of possession of its property. It claims that the defendant was employed as its sales manager. That when the defendant was sick, a vehicle and driver were allocated to take him to and from the doctor. When the defendant was well enough to drive, he started to drive himself and he kept the vehicle. The plaintiff discovered that he was working for another company when he was supposed to be on sick leave. When he left the plaintiff's employment he took away the vehicle without its consent. Upon the defendant's refusal to hand over the vehicle the plaintiff lodged this application.

The defendant denies that the vehicle is owned by the plaintiff and further that he was an employee of the plaintiff. He avers that he was in a partnership agreement with Adam Selby in a company known as Feya Feya. That the vehicle belongs to Feya Feya and that the defendant is entitled to possess and own the vehicle in terms of oral agreement he entered into with Adam Selby whereby either party would on dissolution of the company, leave with the vehicle he was driving.

The following facts are common cause. The defendant was employed as a sales manager. The parties agree that the defendant was in possession of the vehicle at the commencement of this action and still possesses it. It is not disputed that the plaintiff has not consented to the defendant's possession of the vehicle. It is further common cause that the vehicle was bought through a loan sourced by Adam Selby and the vehicle is registered under

the name of Kettex (Pvt) Ltd. What is in dispute is the ownership of the vehicle and the defendant's entitlement to the vehicle.

The plaintiff called Derrick Selby in support of its case. His evidence is as follows. He is the MD of Kettex (Pvt) Ltd trading as Feya Feya. The company was involved in the selling of farming implements. The company is now under liquidation. He was not initially involved in the discussions between the defendant and his brother but he discussed all issues pertaining to Feya Feya with his brother. The defendant was engaged as a sales manager to start doing primary work in the rural areas in September 2009. The functions of the company involved supplying goods and he serviced different provinces of the country. In November 2010 the company secured a loan from Tentex Societe Anonyme to purchase five new pickups and these were allocated to sales personnel. No vehicle was allocated to the defendant who was the sales Manager. Vehicles were allocated to persons playing an active role as there was a severe shortage of vehicles. The defendant would be allocated a vehicle when the company was on a firm footing. The vehicle is registered under the plaintiff's name. In May 2011 the defendant fell ill. Never Machingura who resided in the same area as the defendant was tasked to pick him up and take him to the doctor on a daily basis using the same vehicle in issue. When he became well enough to drive the vehicle, the respondent started driving himself and took the vehicle from never Machingura. The plaintiff later discovered that the defendant was working for another company when he failed to report for work after his sick leave. The witness denied under cross examination that Feya Feya was a standalone company and that the defendant was employed by Feya Feya. He denied that there were plans to register Feya Feya as a company. He denied knowledge of an oral partnership agreement entered into between his brother Adam and the defendant and the existence of an arrangement entitling the defendant to leave with the vehicle. The witness remained consistent with his story under cross examination.

The defendant testified in his own case. His evidence is as follows. The plaintiff company, Kettex (Pvt) Ltd, belongs to his friend Adam Selby. Feya Feya was a company which they were in the process of registering with Adam. In 2009 he and Adam agreed to form a company which was going to sell farming implements in rural areas. His role was to look for markets in rural areas since he had knowledge of rural areas. He was on a salary. Adam would look for capital to start the company. He was going to use Kettex in order to get a loan as Feya Feya was not registered as a company. A loan was approved and came in tranches. Adam was not transparent with the use of the money and that is when trouble

started. Adam started to avoid him and decided that the defendant do procurement whilst he did marketing. He maintained that the loan was for Feya Feya not Kettex. Five vehicles were bought and this particular vehicle was allocated to him and he keeps the spare keys. The vehicles are registered under Kettex but do not belong to it. The witness denied that Never Machingura was allocated a vehicle when he was sick or at all. He used the vehicle from the day it was bought up to now. On dissolution of the partnership he was entitled to take the vehicle as part of the termination package. The partnership was dissolved because Adam had no interest in the formation of Feya Feya and he decided to terminate the contract. He testified that Derrick Selby joined them after the formation of the company and is not privy to what happened before this. He insisted under cross examination that the loan for the vehicles was for Feya Feya and that the vehicle belongs to it. He gave his evidence well and maintained his story.

Next to testify in support of the defence case is Artwell Jochore. He testified as follows. He was previously employed by Feya Feya as a sales person. The defendant was their head of sales. He was never employed by Kettex but Feya Feya. The defendant was allocated a vehicle to use. He started working for Feya Feya in 2010 until 2012. Never Machingura worked together with him at Feya Feya and he was never allocated a company vehicle. He would only be given a vehicle to drive when he was sent on an errand. His evidence was brief.

The plaintiff has brought a *rei vindicatio* to recover the vehicle. A *rei vindicatio* is a common law remedy that is based upon the principle that an owner is entitled to recover his or her property from wherever it may be and from whoever may be holding the property without the consent of the owner. See *Chetty v Naidoo* 1974 (3) SA 13 (A) where at 20B-D, JANSSEN JA remarked as follows.

"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 (eg. a right of retention or a contractual right). The owner, in instituting a *rei vindicatio*, need, therefore, does no more than allege and prove that he is the owner and the defendant is holding the *res* - the onus being on the defendant to allege and establish any right to continue to hold against the owner."

See also *Stanbic Finance Zimbabwe Ltd v Chivhungwa* 1999 (1) ZLR 262 (HC), *Mashavave v Standard Chartered Bank of SA Ltd* 1998 (1) ZLR 436 for the legal position.

A litigant bringing a claim based on *rei vindicatio* should satisfy the following requirements,

- a. That he is the owner of the property
- b. That when the action commenced the respondent was in possession of the property and that the property still exists
- c. That the respondent possesses his property without his consent

The law protects the right of ownership unless a claimant or possessor can show that he is entitled to the property. All that the owner has to do is to prove ownership and that the possessor holds the property without his consent. The onus will then shift to the defendant to prove an entitlement to the property. Two defences are open to him. In order to disprove the plaintiff's claim the defendant is required to show either that the vehicle belongs to him or that although the vehicle does not belong to him, the applicant has lost the right to exclusive possession of the vehicle, thereby proving an entitlement to the vehicle. The defendant admits that he is in possession of the vehicle and possesses it without the consent of the applicant. He denies that the applicant is the owner of the vehicle. He further argues that he is entitled to the vehicle based on an arrangement he made with Adam Selby.

The court will determine first the question of ownership of the vehicle. The defendant refutes that he was employed by the plaintiff and claims that there was a partnership agreement between him and Adam Selby which resulted in the formation of Feya Feya. His evidence is that Feya Feya was in the business of selling farm implements and did operate its business separately from the plaintiff. He contended that he was employed by Feya Feya as its sales manager. The defendant contends in his closing submissions that the loan was applied for by the plaintiff and the loan would be Adam Selby's contribution of capital and further that it was agreed that Adam would use his company Kettex to apply for the loan and it would be easy for Kettex to be advanced the loan than a newly incorporated company. The defendant in his evidence gave a different reason as regards why the applicant took the loan. He testified that the plaintiff could not take the loan in its name because the company was not yet registered. He maintained that the loan taken by the applicant was in reality Feya Feya's loan and that ultimately the company owned the vehicles purchased from the loan. He did not suggest that the loan would be Adam's contribution to the partnership but simply that Adam would look for capital to start the company. The defendant uses the word company and partnership interchangeably in relation to the status of FeyaFeya. There are no formal documents to prove the existence of the partnership. The defendant in his heads of argument

goes through the requirements of a partnership and urges the court to find that this arrangement constituted a partnership. There is no evidence to support the existence of a partnership. The defendant argues that Adam Selby should have been called to help shed light into the agreement they reached. The plaintiff's witness is its managing director. He worked with the defendant and knew what their relationship was. He is qualified to comment on the relationship between Kettex and Feya Feya. The defendant's assertion that the vehicle belongs to Feya Feya is not supported on the evidence available.

The vehicle is registered in the name of the plaintiff and is insured by it. It was not disputed that the plaintiff was paying insurance for the vehicle. The fact that it was doing so supports the assertion that the vehicle belongs to it. If the vehicle belonged to Feya Feya, it would be expected to be paying insurance for the vehicle even though it may still be in the plaintiff's name. There was no suggestion that Feya Feya was paying insurance for the vehicle. The plaintiff also has an asset register where the vehicle is registered. The asset register did not have to be on the plaintiff's letter head. The fact that it was not on plaintiff's letter head does not suggest that it was doctored. Although registration of a vehicle in one's name is not proof of ownership, that is *prima facie* proof that the vehicle belongs to it. There is a presumption that the plaintiff owns the vehicle. The defendant was required to rebut that presumption and he has failed to do that. There is no other evidence except the defendant's say so, that points towards the fact that the vehicle belongs to Feya Feya. His evidence on this point was not corroborated. The defence witness's evidence that both he and the defendant worked for Feya Feya and not Kettex does not take his case anywhere. The defence witness did not go into the technicalities of whether the plaintiff was trading as Feya Feya or it was standalone company. His evidence did not also delve into the ownership of the vehicle. The probabilities favour the plaintiff's story. The defendant has failed to show that the vehicle belongs to Feya Feya.

The evidence led shows that the defendant was allocated a vehicle that he used at work. This is supported by the evidence of the defendant and the defence witness. The evidence of the defence witness that the defendant was allocated a vehicle for use at work was not meaningfully challenged by the plaintiff under cross examination. The next issue is whether the defendant has proved an entitlement to the vehicle. The defendant alluded to an oral agreement the terms of which were that if either party was not happy with the operations of the partnership, the relationship would end and both would be entitled to each take with him the vehicle he was using. The defendant contended that since he has parted ways with

Adam, he was entitled to the vehicle. His evidence on this point was not corroborated. The defendant has not been able to show an entitlement to the vehicle. The vehicle does not belong to Feya Feya and therefore both he and Adam could not legally have agreed to let the defendant have the vehicle. The defendant has failed to prove an entitlement to the vehicle. The plaintiff does not consent to his possession of the vehicle and is entitled to its return. I am convinced that the plaintiff has made a case for *rei vindicatio*.

In the result it is ordered as follows,

1. The defendant is ordered to return Nissan KO3 Pickup registration number ACG 296 within 7 days of this order.
2. Should the defendant fail to comply with this order, the Deputy Sheriff is hereby authorised to seize from the defendant Nissan KO3 Pickup registration number ACG 296.
3. The defendant shall pay costs of suit.

Wintertons, plaintiff's legal practitioners

Bachi-Mzawazi & Associates, defendant's legal practitioners.