RESERVE BANK OF ZIMBABWE
versus
PRIVILEGE MATURURE

HIGH COURT OF ZIMBABWE
MATHONSI J
HARARE, 9 July and 30 July 2014

Civil Trial

V. Mukwachiri, for the plaintiff
Ms T.G. Magaya, for the defendant

MATHONSI J: The plaintiff is the Central Bank of Zimbabwe constituted in terms of the Reserve Bank of Zimbabwe Act [*Cap 22:15*]. It is headed by a Governor who at the material time had created a post of Advisor to the Governor, a post not provided for in the Act which provides for the appointment of not more than two Deputy Governors, but created all the same, whose incumbent was one Dr Munyaradzi Kereke.

The position of Advisor to the Governor enjoyed a lot of autonomy, what with a fleet of 3 pool motor vehicles in its stable and drivers for those vehicles employed by the plaintiff but under the control of the Advisor, who also wielded significant authority, including the authority to hire a driver in his personal capacity. Although such driver was not on the payroll of the plaintiff, the Advisor was entitled to allow him access to all the motor vehicles within his stable belonging to the plaintiff.

The defendant was one such driver in the office of the Advisor employed initially by the plaintiff but after his retrenchment at the end of January 2011, he retained that position at the pleasure of the Advisor. When the time came for the plaintiff to retrench some of its employees and having sought and obtained authority to do so, the Governor wrote to the affected employees a letter dated 7 January 2011 advising them of that eventuality and the process that was to be followed to achieve the outcome. The defendant was a recipient of that letter and it stated in part:

> "Dear Mr Maturure Privilege
>
> **RE: Termination of Contract of Employment through Retrenchment**

1. In line with the provisions of section 12C of the Labour Act No. 17 of 2002 covering the above subject, and the Labour Relations (Retrenchment) Regulations, Statutory Instrument 186 of 2003;

   Notice was given to the Works Council that staff who wanted to go on voluntary retrenchment were to present their names to management. This has since been done. Some members of staff would be put on involuntary retrenchment for realignment purposes. This too has been done.

2. Approval has been received in respect of the total package from: The Reserve Bank of Zimbabwe Board; The Works Council; The Ministry of Public Service, Labour and Social Welfare.

3. Regrettably, you are one of the candidates identified for retrenchment by your Divisional Management so that in line with the new Board's approved Structure, the Bank can focus on its core objectives.

4. You are requested to kindly get in touch with the Human Resources Division to be advised of your total package details before the end of day on Friday, the 14th of January 2011 in order to facilitate the release of your first entitlement of the package and to re-confirm your payment account details.

5. In the interest of good order, and in compliance with the law, you are required to sign an Acknowledgement Form, which is the basis upon which such fiscal entitlement as the retrenchment tax-free thresholds allowance can be availed to you and tax returns submitted to ZIMRA.

6. ……..

7. ……..

8. ……..”

   (The underlining is mine)

The defendant complied with the provisions of the retrenchment letter. He attended at the Human Resources Division and signed the Acknowledgment Form. He also completed a clearance form with the various departments of the plaintiff which set out the details of the employer's property he was surrendering. At the transport division it was endorsed that the motor vehicle he had been using was "being used in Advisor's office."

I have already stated that after retrenchment the defendant continued in the employ of the Advisor in a private arrangement between them and continued using the motor vehicle which had been assigned to him before, namely a Toyota Hilux Vigo registration number

ABD 7870 ("the vehicle") which at separation it had been accounted for as "being used in Advisor's office."

When the office of the Advisor was abolished or became vacant with the departure of Dr Kereke at the end of January 2012, the plaintiff demanded the return of the vehicle. The dispute then arose because the defendant lay a claim to it as his retrenchment package and refused to surrender the vehicle. The parties could not resolve the dispute, as a result the plaintiff instituted this action seeking an order compelling the defendant to return the vehicle, damages for unlawful use and deprivation of the vehicle from 9 February 2012 and punitive costs.

In its declaration, the plaintiff averred that the vehicle had been issued or assigned for use in the Advisor's office where the defendant was attached as a driver. It was in that capacity that the defendant had access to use the motor vehicle which remained the property of the plaintiff. The office of the Advisor having become vacant upon termination of his contract, the plaintiff was entitled to the return of the vehicle for redeployment.

In response the defendant asserted that he is the owner of the vehicle it having been given to him as a retrenchment package in terms of the parties agreement of 7 February 2011. For that reason he has been in lawful possession of the vehicle and the plaintiff has not suffered any damages. The defendant counter claimed seeking payment of his outstanding retrenchment package and the delivery to him of the vehicle's registration book. I must mention that the defendant's claim for his outstanding retrenchment money was disposed of in a judgment relating to a point taken *in limine* handed down on 2 April 2014 (HH 152/14).

The issues that I still have to decide are:

1. Whether the vehicle was awarded to the defendant as part of his retrenchment package in terms of the acknowledgement form as read with the letter of the Governor dated 7 January 2011.
2. Whether the defendant should surrender the vehicle to the plaintiff; and
3. Whether the plaintiff has suffered damages as a result of the defendant's refusal to surrender the vehicle for which the defendant is liable and the quantum thereof.

The plaintiff's case was presented through the evidence of its head of Human Resources Division Elliot Short Rwatirera who has been so employed for 14 years and its Senior Executive Support Services, Francis Tamanikwa. That evidence is simple and straight forward. It is to the effect that the defendant was employed by the plaintiff as a driver, grade

3, and was assigned to the office of the Advisor to the Governor, Dr Kereke. He was not entitled to a personal issue vehicle but in the discharge of his duties he had access to 3 pool vehicles belonging to the plaintiff which were attached to the office of the advisor.

When the defendant was retrenched at the end of January 2011 his retrenchment package did not include a motor vehicle. Motor vehicles were given to managerial employees at head level and above. In that regard they determined the net book value of the vehicle in the possession of that employee which would have been allocated to that employee during the subsistence of the employment contract. Having determined the net book value, the plaintiff offered the vehicle to that employee indicating the net book value on the exist package and the calculated figure would reflect the amount due to the retrenchee taking into account the vehicle offered.

Rwatirera testified that everybody who was entitled to a motor vehicle received from the plaintiff a document to take to ZIMRA for change of ownership. He gave an example of one issued to L. Chari who was offered a Nissan Wolf Double Cab vehicle. The document reads:

> "31 January 2011
>
> Dear L. Chari
>
> Please be advised that in line with the retrenchment formula, you are being offered the following vehicles(s) at the indicated net book value, NBV.

Reg No.	**Model/Make**	**Year**	**NBV (USD)**
AAN 9631	Nissan Wolf 3.0 Double Cab	2006	$0-00

> The amount is payable to the Reserve Bank of Zimbabwe and shall be deducted from your total retrenchment package and back pay that is due to you.
>
> Please note that if your total retrenchment package plus backpay is less than the value of the vehicle(s) above you shall be obliged to pay the Bank the balance by the date of your receipt of final payment from the Bank.
>
> Please be guided accordingly.

Elliot Rwatirera
Senior Executive – Human Resources Management"

Rwatirera explained that such standard letter was given to any retrenchee being offered a vehicle they were using even if the vehicle was being offered at zero value. In addition the vehicle and its zero value would reflect on such retrenchee's Retrenchment Package Advice. Where there was a net book value, as was the case with another example given, that of O. Kanyimo, the document would show the value which would be deducted from money due to the retrenchee. The defendant did not receive any such documents, his acknowledgement form did not cite any vehicle details and his retrenchment advice did not make reference to any vehicle simply because he was never offered a vehicle.

Rwatirera stated that the defendant was a Level 3 grade, the lowest level of managerial employees at the Bank, which level was not entitled to Bank vehicles as part of their employment contracts and in that regard, they were not offered Bank vehicles. He made reference to what he said was a Standard Acknowledgement Form signed by all managerial staff showing the details. In respect of the defendant, he signed it on 7 February 2011. Under the column dealing with vehicle, it simply showed the terms under which an employee entitled to a vehicle would be offered such vehicle, that is, if the vehicle was more than 5 years old, they would "drive out" without paying anything. If it was less than 5 years, the plaintiff would calculate the net book value. No details of a vehicle were inserted in the defendant's acknowledgement form because he was not entitled to any vehicle. Again, the separation clearance form which the defendant signed showed that he did not surrender the vehicle he had been using because it remained "being used in Advisor's office." That shows that he was not offered the vehicle which he continued using in the Advisor's office at the pleasure of the Advisor, although it remained firmly the property of the plaintiff.

The witness also alluded to the defendant's "Retrenchment Package Advice" dated 23 August 2011 which, unlike that of Chari, did not contain any reference to a vehicle whatever its value, again emphasizing the fact that the defendant did not have the vehicle as his retrenchment package. Even the ZIMRA application for a tax deduction directive form for the defendant which he produced made no reference to a motor vehicle. He was not given any document for change of ownership of the vehicle as no vehicle was offered to him.

The witness went on to say that after the defendant's retrenchment, the vehicle continued being fuelled and serviced by the plaintiff in recognition of the fact that it belonged to the plaintiff. He produced fuel requisition forms and service records showing that it was

serviced by Harare Toyota and Croco Motors during the time it was in use at the Advisor's office long after the defendant had been retrenched. If the vehicle had ceased to belong to the plaintiff it would not have been fuelled weekly and serviced regularly at the plaintiff's expense. The plaintiff does not do that to individuals' vehicles.

He stated that when Dr Kereke left employment he was asked to surrender the vehicle along with that which was being used by another attaché of his P. Sibanda. He scribbled a response:

> "MR MANASE
>
> 1) Please take note: (a) Mr Sibanda (ZRP) will bring vehicle today. (b) Mr Maturure is not a Bank Employee. He was retrenched last year (2011).
>
> Thank you.
>
> M. Kereke
> 8/2/12"

That response was not helpful at all as it did not deal with the status of the vehicle.

Francis Tamanikwa, who heads the transport division re-iterated what Rwatirera said in his evidence producing the registration book showing that the vehicle belongs to the plaintiff and affirming the service history and the fuelling of the vehicle while it was being used by the defendant when he was privately employed by Dr Kereke. He maintained that it was a pool vehicle used for the day to day running of the Advisor's office.

The 2 gentlemen who testified on behalf of the plaintiff gave their evidence extremely well supported by documentation which they explained very clearly. In the process they made up a very good and clear case for the plaintiff in respect of ownership of the vehicle. What they failed to do though, is justify the claim for damages. They only stated that the claim for damages is based on a quotation obtained from Europcar on 3 August 2012 to the effect that they were hiring out a Mazda BT50 motor vehicle at the time at a daily rate of $109-00. As to how this relates to the use of the vehicle, itself a Toyota Vigo, by the defendant and what mileage the use related to, they did not say. That evidence does not assist me to assess what loss the plaintiff has suffered as a result of the defendant's refusal to surrender the vehicle.

Try as he could the defendant could not rebut the evidence given on behalf of the plaintiff. In fact the defendant did not make a good witness at all. He stammered, stattered and in the end he could not show where in the retrenchment documents, it says he was given the vehicle as a package. Asked to show where in the Acknowledgement Form he signed on 7 February 2011, a document he claimed is the basis of his claim to the vehicle, he could not. He only cited the column of a vehicle which column, as I have said, does not identify any vehicle but appears to contain only terms upon which vehicles were offered. It does not offer him any vehicle.

The defendant maintained that he was given the vehicle although he could not place a finger on anywhere in the retrenchment documents, where he is given the vehicle. Comically, he stated that there is nowhere in the documents where it says he is not entitled to the vehicle, a clear case of putting the cart ahead of the horse. While conceding that those who were offered vehicles were given documents to that effect for change of ownership, the defendant insisted that he is still waiting for his own similar document.

The defendant stated that after his retrenchment he was employed privately by Dr Kereke at his butchery although he still reported at the plaintiff's offices and that he was using "his" vehicle in carrying out Dr Kereke's errands. In return he was being assisted with school fees for his children. He could not explain why he was using what he regarded as his personal vehicle to conduct Dr Kereke's business and why his personal vehicle was fuelled and serviced at the plaintiff's expense all the time.

I was not impressed by the defendant as a witness and he simply did not make out any discernible case at all. His story was so incoherent it became difficult to think that he wanted to be taken seriously. For instance when quizzed under cross examination about the contents of the separation clearance form which recorded that he was not surrendering the vehicle because it continued being used at the Advisor's office, he could only say that according to the acknowledgement form he signed, he had already been given the vehicle and that the separation form only allowed him to enter the plaintiff's premises with it while conducting Dr Kereke's private business. Nothing can be furthest from the truth.

In my view, the defendant is engaging in a futile exercise because the acknowledgement form he anchors his claim on does not support his case. Quite to the contrary, all the documents produced in court point to one direction, namely that the motor vehicle is registered in the plaintiff's name. It was used by the defendant during and after his employment in the furtherance of the plaintiff's affairs as he was serving under the Advisor.

When he was retrenched he was not offered and certainly did not accept the vehicle as his retrenchment package. When the office of the Advisor became vacant, the defendant simply engaged in a smash and grab exercise making off with the vehicle belonging to the plaintiff and refused to return it without any justification.

The plaintiff has brought this matter as an *actio rei vindicatio* the nub of which is that an owner of a property, be it movable or immovable is entitled to reclaim possession of his property from whomsoever is in possession of it. 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 enforceable right against the owner like the right of retention or a contractual right. *Chetty* v *Naidoo* 1974 (3) SA 13 (A) 20 B-D where JANSEN JA said:-

> "The owner, in instituting a *rei vindicatio*, need therefore, do 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."

In our jurisdiction that pronouncement was quoted with approval in *Hamtex Investments (Pvt) Ltd* v *King* HH 403/12; *Agrochem Dealers (Pvt) Ltd* v *Gomo & Ors* 2009 (1) ZLR 255 (H) and in *Alspite Investments (Pvt) Ltd* v *Westerhof* 2009 (2) ZLR 226 (H) where at 237 A – B MAKARAU JP (as she then was) said:-

> "There are primarily two defences to the *rei vindicatio*, each aimed at destroying each of the two essential elements of the action. The first one seeks to destroy the claim of ownership completely by denying that the plaintiff is the owner of the property in question or seeks to diminish his rights in the property by admitting his or her ownership but by alleging that the plaintiff has parted, under some recognised law, with the right to exclusive possession of the property. The second defence of course is to deny possession of the property at the time the action is brought or the claim is instituted."

I have stated that the evidence led shows that ownership of the vehicle lies with the plaintiff. It would ordinarily therefore be entitled to vindicate against the whole world and indeed the defendant unless the latter can sustain any of the 2 defences alluded to by MAKARAU JP (as she then was) in *Alspite Investments* (*supra*). The defendant has admitted

possession. He would therefore, survive the implications of a *rei vindicatio* by either destroying the claim to ownership or showing a diminished right of ownership.

In my view, the defendant has dismally failed to sustain any defence. He has not shown that he was awarded the vehicle as part of his retrenchment package in terms of the acknowledgement form that he signed at his retrenchment. He has not pointed to any other basis upon which ownership could have transferred to him or curtailed.

I conclude therefore, that the plaintiff is indeed entitled to vindicate against the defendant who has no choice but to surrender the vehicle. Regarding the second leg of the plaintiff's claim I have already said that the plaintiff has not proved its entitlement to a recognisable figure in the form of damages. While the plaintiff is entitled to some form of compensation for the unauthorised use of its vehicle, it still bears the onus to prove the quantum of such compensation. Having failed to come up with an acceptable formular for computing the damages, I am unable to accede to the prayer for damages which remains unproven.

Regarding the claim for costs on the legal practitioner and client scale, the plaintiff has not established an entitlement to these. It cannot be said that the defendant's resistance of the claim was outrageous in the circumstances especially as the plaintiff's conduct of allowing a non-employee to drive its vehicle under the watch of Dr Kereke for over a year, may have led the defendant down the garden path.

In the result, IT IS ORDERED THAT:

1. The defendant shall forthwith deliver to the plaintiff the Toyota Hilux Vigo motor vehicle registration number ABD 7870.
2. The defendant shall bear the costs of suit on an ordinary scale.

T.H. Chitapi & Associates, Plaintiff's Legal Practitioners
Magaya - Mandizvidza, Defendant's Legal Practitioners