GRAIN MARKETING BOARD
versus
ALBERT MANDIZHA

HIGH COURT OF ZIMBABWE
CHIGUMBA J
HARARE, 10 November 2015 and 8 January 2016

Opposed Application

S Bhebhe, for the applicant
T Zhuwarara, for the respondent

CHIGUMBA J: In this *rei vindicatio* application the following order is sought;-

1. That the respondent be and is hereby ordered, within 24 hours of the grant of this order (or of the service of this order on him or his legal representatives) to surrender possession of and to return to the applicant motor vehicles namely, a Toyota Hilux double cab registration number ACR 2708 and a Land Rover Discovery registration number ADJ 3520 (hereinafter referred to as the two motor vehicles).
2. In the event of the respondent failing to comply with para 1 hereof, the sheriff be and is hereby authorized to take such steps as may be necessary to recover the said motor vehicles from the respondent or any person in possession thereof on the authority of the respondent and return it to the applicant.
3. That the respondent shall pay the costs of this application.

The applicant is a statutory body constituted in terms of the *Grain Marketing Act [chapter 18: 14]*, and the respondent is its former employee, its general manager whose contract of employment was terminated on 30 November 2014. This is an application for an order to compel the respondent to return and restore possession to the applicant of the two motor vehicles named above. The vehicles were allocated to the respondent in terms of the contract of employment between the parties which was entered into on 1 December 2014. Clause 12 of the

contract of employment stipulates that the General Manager shall be entitled to an all terrain motor vehicle which shall be his official vehicle, whose standing and running expenses shall be borne by the State Procurement Board (SPB). An option to purchase this official vehicle was to be available at the expiry of the contract of employment, at 60% of its market value. In addition to the official vehicle, the General Manager was to be entitled to the use of one official pool motor vehicle, which he would be allowed to purchase at the discretion of the SPB on termination of his employment for reasons other than dismissal.

It is common cause that the two motor vehicles are currently registered in the applicant's name (see Annexures B1 and B2). It is common cause that the contract of employment expired by the effluxion of time on 30 November 2014 and that the respondent was advised that it would not be renewed on 28 November 2014. It is common cause that the parties agreed to let the respondent stay on as a caretaker, subject to monthly reviews, until the applicant's board determined a way forward (see Annexures D1 an D2). It is common cause that the parties agreed to maintain this *status quo* until 31 January 2015. The respondent requested that the Board pay him his terminal benefits after that date. On 30 January 2015, the respondent asked the applicant's board to allow him to continue to use the two motor vehicles, 'pending the finalization of his exit package'. The applicant acceded to the request, up to the end of February 2015. On 9 March 2015, the respondent was advised that the applicant's board had resolved not to sell to him the pool vehicle (the Toyota Hilux), and that he was to return it by 10 April 2015.

On 20 March 2015, the applicant asked the respondent to advise whether he wished to exercise the option to purchase his official motor vehicle, the Landrover Discovery. The respondent confirmed such an intention, in a letter dated 24 March 2015. On 30 March 2015, the respondent's terminal benefits were calculated and found to have a negative deficit. The respondent was asked to advise how he wished to pay for the acquisition of the Landrover Discovery. He did not respond to the query. On 17 April 2015 the applicant demanded that the respondent return the two motor vehicles to it immediately. By 28 April 2015, when this application was filed, the respondent had failed, refused, or neglected to do so. On 11 May 2015, the respondent filed his opposing affidavit to this application, in which he averred that the applicant had unlawfully terminated his contract of employment, and that he had requested, and

been granted permission to retain possession of the two vehicles, until such time as his exit package was calculated in full and finalized. In his view, this has not yet come to pass.

The respondent reiterates that the applicant was aware of his intention to use his exit package to pay for the acquisition of the two vehicles, and that, since he was waiting for the applicant to pay him his exit package, he was not obliged to return possession of the two motor vehicle to the applicant. The respondent accused the applicant of being guilty of material non disclosure of certain facts in an attempt to deceive the court; that is, the labour dispute as to the lawfulness of the termination of his contract of employment (which was filed on 9 April 2015). His claim is pending before the labour court. The vehicles are parked safely at his Borrowdale residence, which fact he alleges was verified by various applicants' personnel. Both vehicles are insured and licenced up to July 2015. The respondent averred that there are material disputes of fact which cannot be resolved on these papers. The applicant allegedly advertised for applications to his post before his contract of employment was properly terminated and conducted interviews before the labour dispute was resolved. The respondent insists that he has a contractual right to retain the possession and use of the two vehicles until such time as the labour dispute is resolved. He claims a lien over the two vehicles.

The issue that arises for determination is whether the respondent is entitled to retain the use and possession of the two vehicles in circumstances where the applicant avers that his exit package was calculated and it is clear that there is a deficit, but he insists that his contract of employment was unlawfully terminated and that the labour court must determine that issue first, before he can be made to surrender the vehicles to the applicant. Put differently, in what circumstances can a vindicatory claim filed in this court, of movable property conferred in terms of a contract of employment, be defeated by a counter-claim based on the same contract, which is yet to be determined by a different court of exclusive labour and employment jurisdiction? Let us first consider if the preliminary points raised by the respondent have merit, and a are sufficient to dispose of this matter. The first point, that the applicant ought to have disclosed that there is a labour dispute pending before the labour court, is defeated by the dicta in the following case;- *Zimbabwe Educational Scientific Social and Cultural Workers Union* v *Claud Kaharo* [1], where this court stated in unequivocal terms that:

[1] *HH 222/11,*

> "…A rei vindicatio action, which is rooted in common law, is certainly not one of those where the Labour Court enjoys jurisdiction …unless its jurisdiction has been specifically and expressly ousted by the legislature, this court has a concomitant duty to jealously guard against the erosion of its inherent jurisdiction. I am firmly convinced that this court enjoys its power to hear an action for vindication, because, as I said, this power falls outside the jurisdiction of the Labour Court".

It follows that a vindicatory action, being based on common law and falling under the purview of this court's inherent jurisdiction, can never be defeated or play second fiddle to proceedings pending before the labour court. Therefore it cannot be said that the failure to disclose a pending labour dispute by the applicant is material, or so material as to justify a finding of lack of probity on the part of the applicant. The disclosure of the pending labour dispute would not have influenced the decision of the court in determining this application, and there is no justification for the exercise of the court's discretion in setting these proceedings aside as it was invited to do by the respondent. Further, there is no evidence of *mala fides* on the part of the applicant in not disclosing this fact to the court. There is no basis on which this court can penalize the applicant with a punitive order as to costs, because the existence of a pending labour dispute is not material to the disposal of a vindicatory action. None of the cases cited on this preliminary point in the respondent's heads of arguments are instructive, for these reasons.

The second preliminary point raised, that there are material disputes of fact which are incapable of resolution on these papers, warrants closer scrutiny. Is it material to the determination of a vindicatory action that the labour court first determines the extent of the terminal benefits that the applicant ought to pay to the respondent? Is this a genuine dispute of fact which is material to the determination of the application before the court? On the issue of what a material dispute of fact is which warrants dismissal of an application on the basis that the applicant ought to have proceeed by motion proceedings, we are guided by the following cases;- *Soffiantini* v *Mould* [2]*Masukusa* v *National Foods Limited & Anor*[3], *Zimbabwe Bonded Fibreglass (Pvt) Ltd* v *Peech*[4], *Executive Hotel (Pvt) Ltd* v *Bennet NO* [5]*and Supa Plant Investments (Pvt) Ltd* v *Edgar Chidavaenzi*[6], where it was stated that;-

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[2] 1956 (4) SA 150 (ED) @154
[3] 1983 (1) ZLR 233 @ 234
[4] 1987 (2) ZLR 338 (SC)
[5] 2007 (1) ZLR 343 @ 348B-D
[6] HH 92-09 @p4

> "A material dispute of fact arises when such material facts put by the applicant are disputed and traversed by the respondent in such a manner as to leave the court with no ready answer to the dispute between the parties in the absence of further evidence".

Put differently, it is my view that, the phrase material dispute of facts, in the application procedure, refers to the untenable position where averments are made in an affidavit, which averments have a direct bearing on the outcome of the matter, yet the papers which will be before the court, from the founding affidavit, the opposing affidavit, the answering affidavit, the annexures attached, the heads of argument, the parties oral address at the hearing of the matter, leave the court riddled with doubt and uncertainty as to the veracity of the averments, to the extent that it ought to have been clear to the applicant, at the outset, that the court would be unable to come to a conclusive decision, on the merits of the application. Such is not the case here. The alleged disputes of fact do not arise from the applicant's averments, and are not material to the disposition of a vindicatory action in the circumstances before the court.

To borrow the words of my brother Judge in the case of *Telecel Zimbabwe (Pvt) Ltd* v *Postal & Telecommunications Regulatory Authority of Zimbabwe (PORTRAZ) & Ors*[7], a preliminary point should be taken where firstly it is meritable and secondly it is likely to dispose of the matter. None of the two preliminary points raised on behalf of the respondent have merit, or are likely to dispose of the matter. The raising of the two points amounts to an abuse of court process, and raise the suspicion that the respondent's legal practitioners are well aware of the deficiencies in their client's case, on the merits. Turning to the merits of the matter, it is trite that the relief of *rei vindicatio* is available to the registered owner of property, who is at law, entitled to be in physical possession of his property, the *res*. An owner of property is at liberty to repossess his property at any time that he desires, because it is the nature of ownership that possession of the property should repose in its owner at all times. See *Graham* v *Ridley* 1931 TPD 476, where the principle was set out as follows:

> "….It is inherent in the nature of ownership that possession 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."

In *Chetty* v *Naidoo* 1974 (3) SA 13 at p 14 the principle was reinforced as follows:

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[7] HH446-15

> "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 contractual right)."

In *Sanudi Masudi* v *David Jera HH 67/07* at p 2-3 it was stated that:

> "Based on the authorities, it appears to me settled at law that the *rei vindicatio*, being an action in *rem*, is only available to owners of the property in issue, which at the time of the commencement of the action, is in the possession of the defendant and the defendant fails to prove a right to retain the property as against the owner."

In *Stanbic Finance Zimbabwe LTD* v *Chivhungwa* 1999 (1) ZLR 262 (HC) Malaba J, applied the principle behind the *rei vindicatio* to the case of a motor vehicle owned by the plaintiff and leased to a buyer under a suspensive agreement of sale. In that matter, he referred to his decision a year earlier in *Jolly* v *A Shannon & Anor* 1998 (1) ZLR 78 (HC) where he had this to say at p 88:

> "The principle on which the *actio rei vindicatio* is based is that an owner cannot be deprived of his property against his will and that he is entitled to recover it from any person who retains possession of it without his consent. The plaintiff in such a case must allege and prove that he is the owner of a clearly identifiable movable or immovable asset and that the defendant was in possession of it at the commencement of the action. Once ownership has been proved its continuation is presumed. The onus is on the defendant to prove a right of retention*: Chetty* v *Naidoo* 1974 (3) SA 13 (A) at 20A-C; *Makumborenga* v *Marini* S-130-95 p 2. It follows that the action is based on the factual situation that prevailed at the time of the commencement of the legal proceedings."

In *Alspite Private Limited* v *Westerhoff* 2009 (2) ZLR 226 (H) @ p 236 E-F, which was a case involving distribution of property following divorce, and the court was required to distinguish between rights enforceable against the whole world, and rights which are enforceable *in personam*, the court stated that:

> "The *rei vindicatio* is an action that is founded in property law. It is aimed at protection ownership. It is based on the principle that an owner shall not be deprived of his property without his consent. So exclusive is the right of an owner to possess his or her property, that, at law he or she is entitled to recover it wherever found and from whomsoever is holding it, without alleging anything further than that he or she is the owner and that the defendant is in possession of the property. Thus it is an action in *rem*, enforceable against the world at large. This is settled law in our jurisdiction, and hardly requires authority. See *Siyanda* v *The Church of Christ* 1994(1) ZLR 74(S), *Musanhi* v *Mt Darwin Rushinga Cooperative Union* 1997 (1) ZLR 120(S), *Mashave* v

Standard Chartered Bank of South Africa Ltd 1998 (1) ZLR 436 (S)…", Surface Investments (Pvt) Ltd v *Maurice Chinyani*[8]

The simple interpretation of these cases is that once ownership is proved or admitted, the onus shifts to the possessor to prove either the consent of the owner to possession, or a contractual right which is sufficient to defeat ownership. According to *LCT Harms, Amlers Precedents of Pleadings*[9], in order to be successful in a vindicatory action the applicant must allege and prove;-

1. Ownership of the thing (whether movable or immovable); and

2. That the defendant was in possession of the property when the action was instituted.

The applicant attached copies of the registration books of the two motor vehicles which are registered in its name. The respondent did not dispute that the applicant is the owner of the two vehicles, *See Posts & Telecommunications Corporation* v *Winifreda Ndakaiteyi Mhaka* [10], *John Strong (Pvt) Ltd & Anor* v *William Wachenuka & Anor* [11] *(*for a discussion of the established principle that an allegation or an averment which is not denied is taken to have been admitted). The respondent admitted to having the two vehicles in his possession, safely parked at his Borrowdale house. The onus now shifts to the respondent to allege and prove what right he has to retain possession. In this case the respondent has alleged that his right to retain possession is based on his contract of employment which he alleges was unlawfully terminated.

We must determine whether the applicant has successfully shown that the respondent's entitlement to possession of the two vehicles in terms of the contract of employment was successful cancelled? Put differently, was the contract of employment between the parties conclusively terminated? See *Arundel School Trustees* v *Pettigrew*[12]. See also *FBC Bank* v *Energy Deshe* [13], *and Surface Investments (Pvt) Ltd* v *Maurice Chinyani*[14], *African Sun*

[8] HH295-14
[9] 2009 @ p 393-394
[10] HH 127-03 @p2
[11] HH 118-10
[12] HH 242-14.
[13] HH 285-11
[14] HH 295-14

Zimbabwe (Pvt) Ltd v *Sifelani Mlongoni*[15]. In *Zimasco Private Limited* v *Farai Maynard Marikano*[16], it was held that assets which form part of conditions of service may be retained until the contract of employment is conclusively terminated. As long as the contract of employment remains extant, the employee's rights remain vested in the employee. My reading of that case however, is that the employee's rights must be recognized and understood by both employer and employee as rights conferred by the contract of employment. Let us examine the evidence on record about the terms of the contract of employment entered into by the parties. Paragraph 10.12.3 stipulates, in relation to the pool car, the Toyata Hilux, that, on termination of his employment for reasons other than dismissal or his death, the General Manager may be allowed to purchase the pool motor vehicle at the discretion of the Board. It is common cause that the Board did not exercise its discretion in favour of the respondent. With regards to the official vehicle, the Landrover Discovery 4 para 10.12.2 of the contract of employment provides that if the General Manager completes his contract herein, and is not offered a renewal of the same, he shall be entitled to purchase the official vehicle at 60% of its market value.

It is common cause that the respondent has not yet purchased the official vehicle in terms of the contract of employment. In *Joram Nyahora* v *CFI Holdings (Pvt) Ltd*[17], we were guided by the Supreme Court in similar circumstances, as follows;-

> "As matters now stand, no offer has been made to the appellant by the respondent employer. The terms of the purchase have not been set. The appellant has no sale agreement on which to found the right to purchase. He is not entitled to hold onto the vehicle pending agreement".

The respondent in this case was asked to advise the applicant how he intends to purchase the official vehicle because of the deficit in his terminal benefits. He has not controverted the applicant's assertion that he did not respond to the query. It is trite that a prospective purchaser is not entitled to have possession of the merx against the wishes of the seller, prior to delivery of the merx in terms of the sake agreement. See *Medical Investments Limited* v *Pedzisayi*[18]. So even if the applicant has indicated its intention to sell the official vehicle to the respondent in terms of the contract of employment, he is not currently entitled to its possession until such time

[15] HH 332-15
[16] SC181-10
[17] SC 81-14
[18] HH 20-2010

as the sale is concluded, the purchase price paid in full. The applicant has indicated its intention to honour the contract of employment by selling the official vehicle to the respondent. That has nothing to do with deficiencies in respondent's other terminal benefits. The respondent should either pay up the purchase price, in terms of the contract of employment, or relinquish possession to the applicant. It is not stipulated in the contract of sale that the payment of the purchase price is conditional on a successful conclusion of the payment of the respondent's other terminal benefits. The applicant was obliged to sell the official vehicle to the respondent. The respondent was advised of the intention to fulfil this condition of the contract of employment. He has not provided the court with a suitable explanation as to why he has not communicated to the applicant whether he intends to pay the purchase price and if so, how. The applicant is entitled to assume that the respondent has declined to accept the offer to sell in the absence of the respondent's confirmation of intention to buy. There was an offer, but no acceptance. Therefore there is no valid contract of sale between the parties which would entitle the respondent to hold onto the official vehicle.

The court was not impressed by the respondent's attempt to hoodwink it into making a finding that the applicant consented to the retention of the two vehicles. The evidence on record shows that the applicant agreed to let the respondent keep the two vehicles for a limited period, on compassionate grounds. There being neither consent to possession nor evidence of possession in terms of a claim of right or a contract, it follows that the applicant is entitled to the relief that it seeks. The respondent never had any right in terms of the contract of employment to retain the Toyota Hilux, especially after the Board communicated to him that it had resolved not to sell that vehicle to him. The respondent had a clear right to have the official Landrover Discovery vehicle sold to him at 60% of its market value. An offer was made to him by the applicant. He did not accept the offer. No contract of sale exists between the parties. The respondent is not entitled to possession of that vehicle until such time as a valid contract of sale is entered into and executed by the parties.

In the result;-

1. The respondent be and is hereby ordered, within 24 hours of the grant of this order (or of the service of this order on him or his legal representatives) to surrender possession of and to return to the applicant motor vehicles namely, a Toyota Hilux double cab

registration number ACR 2708 and a Land Rover Discovery registration number ADJ 3520.

2. In the event of the respondent failing to comply with para 1 hereof, the sheriff be and is hereby authorized to take such steps as may be necessary to recover the said motor vehicles from the respondent or any person in possession thereof on the authority of the respondent and return it to the applicant.
3. That the respondent shall pay the costs of this application.

Messrs Kantor & Immerman, applicant's legal practitioners
Messrs Mawere & Sibanda, respondent's legal practitioners