ZIMBABWE BROADCASTING HOLDINGS
versus
SEMUKELISO GONO

HIGH COURT OF ZIMBABWE
GOWORA J
HARARE 27 May 2009 and 13 January 2010

Opposed Court Application

J C Muzangaza, for the applicant
T S Manjengwa, for the respondent

GOWORA J: The applicant is a duly registered corporate entity under the laws of this country. On 30 March 2008 following conciliation through an arbitrator the dismissal of the respondent from amongst the ranks of the applicant's employees was confirmed. As a result the parties' formal relation came to an end. At the time the respondent was in possession of a vehicle belonging to the applicant. The applicant had requested that the respondent, some time prior to these sad events, use her own vehicle for the business of the applicant. In turn, the applicant undertook to have the vehicle serviced and repaired at its own cost. The vehicle required certain repairs and as a result the respondent was given use of the applicant's vehicle on the understanding that it would be returned once hers had been properly repaired. When the relationship was terminated, the respondent's vehicle was still undergoing repair. Some time thereafter the applicant sent the respondent's vehicle to her with a request that its own be returned. The respondent refused and it is that refusal that has prompted the applicant to launch these proceedings for a *rei vindicatio* for the return of the vehicle. The respondent has opposed the granting of the relief in question.

Our law, as it currently stands, is to the effect that once an employee has been suspended or dismissed from employment, any benefits extended to such employee from that relationship cease. In *Chisipite Schools Trust* (*Pvt*) *Ltd* v *Clark*[1] GUBBAY CJ stated:

> "Pending the removal of the suspension, the respondent was not entitled to the continued enjoyment of the benefits comprising the free occupation of the Headmistress's house and the continued use of the motor vehicle. A Labour Relations

[1] 1992 (2) ZLR 324

> Officer cannot order the respondent to surrender these particular benefits. Consequently, the applicant being unable to resort to self-help approached the High Court for relief I consider it was justified in doing so".

I respectfully associate myself with the remarks of the learned Chief Justice. The respondent stands dismissed and a conciliator has ruled in favour of the applicant. The respondent has noted an appeal to the Labour court but the noting of the appeal cannot give her the right to retain the property that she had possession of as a result of the contract of employment which is currently terminated. She has then to return the property in the absence of a recognizable defence to the claim by the applicant for the return of its property. See *Stanbic Finance Zimbabwe Ltd* v *Chivhunga*[2], and *Mashave* v *Standard Bank of South Africa*.[3] In the latter case the Supreme Court per MCNALLY JA at p 438C-D stated authoritatively:

> "The Roman-Dutch law protects the right of an owner to vindicate his property, and as a matter of policy favours him as against an innocent purchaser. See for instance *Chetty* v *Naidoo* 1974 (3) S A 13 (A) at 20A-C. The innocent purchaser's only defence is estoppel."

This dicta was quoted by MALABA J (as he was then) in *Stanbic Finance Zimbabwe Ltd* v *Chivhunga supra*. In *casu,* the respondent does not claim a right to retain the vehicle through an agreement to purchase the vehicle as was the case in the two cases quoted above. Rather, she seeks to rely on what has been termed an antecedent agreement between the parties. In his heads of argument Mr *Manjengwa* argued that the parties had an agreement which imposed consecutive obligations on each other. He contends that the applicant had to finance and service the respondent's motor vehicle to a satisfactory and roadworthy condition, facilitate its transfer into respondent's name and thereafter deliver it to the respondent. It was only then, so the argument goes, that the applicant would be entitled to have the Toyota Corolla returned to it. He relies on *SA Crushers* (*Pty*) *Ltd* v *Ramdass*[4] for this submission. At p 546D-F SHAW J stated"

> "Mr Cooper, for the respondent, submitted that the two obligations could not be separated in this way although practically they would have to be performed consecutively. The passage above cited from *Mackenzie*'s case, indicates, however, that where the obligations fall to be performed consecutively, the party who must first

[2] 1999 (1) ZLR 262 (H)
[3] 1998 (1) ZLR 436 (S)
[4] 1951 (2) S.A 543

> perform is not entitled to withhold performance merely because the other party has not tendered performance *pari passu* or expressed his willingness to perform at a later date."

I did not understand Mr *Muzangaza* to challenge the correctness of this principle. His contention rather, was that there were no consecutive obligations imposed by the parties on the return to the applicant by the respondent of the vehicle in question and that this was a defence mounted by the respondent as an afterthought to the vindicatory claim. It is necessary therefore to consider the facts.

The vehicle was a benefit afforded to the respondent in terms of a contract of employment with the applicant. That contract has since been terminated. The respondent has therefore to establish a defence to the claim by the applicant for the return of its vehicle to its possession. The respondent has contended that the applicant was obliged to repair, service and register in her name, the vehicle she had purchased from the former and which was still in its name. The respondent has not produced a written contract and seeks to rely on an alleged oral agreement which the applicant disclaims.

The return of the vehicle was claimed by way of a written communication to the respondent dated 6 October 2008 but delivered to the respondent on 8 October 2008. Her own vehicle was returned under cover of the letter in question. The respondent received and retained her own vehicle but refused to surrender the applicant's. She wrote a note in which she raised the lack of insurance on the vehicle (hers), the lack of a licence and that the vehicle, presumably hers, had nothing to do with her contract as "GM Finance and Corporate Affairs". On 9 October 2008 acting on instructions from their client, the applicant's legal practitioners addressed a suitable letter to the respondent demanding a return of the vehicle. The letter received a prompt reply from the respondent's legal practitioners, who requested for an extension to 27 October 2008 for their client, the respondent to have use of the vehicle. The alleged contract now being sought to be relied on as a defence was not alluded to by the legal practitioners in question. The request was acceded to by letter dated 21 October 2008 and on 22 October the respondent's legal practitioners then wrote a letter to the applicant's legal practitioners requesting an indefinite extension for their client to return the vehicle. This was turned down and a repeated demand was made for the return of the vehicle ultimately resulting in the launching of these proceedings by the applicant for the recovery of its vehicle.

The respondent's use of the applicant's vehicle was by virtue of her employment with the applicant and her right to retain possession terminated with her dismissal from

employment. She did buy a vehicle from the applicant and whatever obligations the applicant assumed under that agreement, those obligations were not tied to the respondent's use of her officially allocated vehicle as a member of staff of the applicant. It is clear on the facts that the obligation by the applicant to service and repair the respondent's vehicle arose from the use by the respondent of her vehicle on the applicant's business and that this usage had occurred prior to her being suspended from duty. In any event, the communication from herself and her legal practitioners prior to the institution of these proceedings does not establish an oral agreement as alleged by her for the rectification of defects on her vehicle. There was no demand by her for the alleged service and repairs to be effected before she could return the applicant's vehicle. Indeed as submitted by Mr *Muzangaza* repairs to her vehicle was not a condition upon which the parties had agreed for her to retain the applicant's vehicle. Rather, she is seeking to justify her retention of the vehicle on the basis of claims arising out of her contract of employment which she has not even litigated upon.

In the premises I find that the applicant is entitled to an order as prayed.

I therefore make an order in the following terms:

IT IS ORDERED THAT:

1. The respondent within 24 hours of the date of service of this order upon her, shall deliver the applicant's vehicle *viz*, a Toyota Corolla registration number AAP 6950 to the applicant's premises at Pockets Hill, Highlands, Harare.

2 In the event that the respondent fails to comply with para 1. above, then the Sheriff for Zimbabwe or his lawful deputy is hereby ordered and authorized and required to seize the aforementioned vehicle from the respondent or from whomsoever or wherever it may be found and to deliver the same to the applicant.

3 The Deputy Sheriff is authorized in the execution of his duties above to enlist the assistance of members of the Zimbabwe Republic Police as he may deem necessary.

4. The respondent shall pay the costs of this application.

Muzangaza Mandaza & Tomana, legal practitioners for the applicant
Wintertons legal practitioners, for the respondent.