CABS
versus
PATIENCE MAGODO

HIGH COURT OF ZIMBABWE
MTSHIYA J
HARARE, 26 February 2014 and 4 June 2014

Opposed matter

T.I Gumbo, for the applicant
J Samukange, for the respondent

MTSHIYA J: The applicant herein seeks the following relief: -

"IT IS ORDERED THAT:-

1. The Respondent be and is hereby ordered to deliver applicant's motor vehicle being a Toyota Prado registration number ABP 3870 to the Applicant within 7 days of service of this order.
2. In the event that the Respondent fails to comply with paragraph 1of this Order, the Deputy Sheriff is hereby directed to seize and attach the aforesaid motor vehicle it can be found and hand over the said motor vehicle to the applicant.
3. That the Respondent shall pay costs of this Application."

The respondent is a former employee of the applicant. She was employed as Head of Credit but upon being charged with certain acts of misconduct was dismissed with effect from 8 October 2012. When the hearing commenced the dismissal was still being contested. However, at the end of the hearing counsel for the respondent produced a letter from the applicant dated 10 February 2014. The letter confirmed the respondent's dismissal with effect from 8 October 2012. I shall not therefore go into what transpired leading to the applicant's final decision which was communicated to the respondent's counsel on 10 February 2014. The respondent's counsel intimated that upon receiving the letter they had filed an application for review. That means the labour dispute is still unresolved.

It was alleged that, prior to her dismissal, the respondent, as part of management, was entitled to and had the use of a motor vehicle, being a Toyota Prado registration number ABP3870. The respondent's use of that vehicle was in line with the applicant's "Management Car Scheme Rules."

Following termination of the respondent's employment the applicant now wants the respondent to surrender the vehicle to it. The respondent objects to the surrender of the vehicle in the following terms:-

> " I applied for a management motor car scheme and a Mr Phillip Cameron who was the General Manager for Credit and Administration refused to approve my application to pay for the car in full. At the time of refusal, Applicant had advanced me part of the purchase price but I was never a beneficiary of the scheme. I have been insuring the motor vehicle myself. I had the vehicle repaired three out of four times at my expense. The Applicant refused to meet the costs even though I was entitled to motor vehicle expenses. I was never allocated a parking space at Applicant's headquarters were I was based despite the fact that the other managers were given parking space. I did not receive a motor vehicle allowance even though I was entitled to. Other executives were given brand new vehicles whilst I purchased mine second hand. If the vehicle was treated as belonging to the Applicant, then Article 6 should have been put into place. If the car belonged to Applicant, then all vehicle maintenance must have bee done by Applicant. This was never done. The motor vehicle does not belong to the Applicant. In any event, I am still in the employ of the Applicant and upon departure I will keep it. As soon as the labour proceedings are finalized, I will institute proceedings for the Applicant to issue me with a brand new vehicle. I am entitled to a new vehicle like all other executives."

The respondent's refusal to surrender the vehicle to the applicant necessitated the filing of this application on 23 January 2013.

In her opposing papers the respondent also raised a point in *limine*. She argued that Stanley Chinakidzwa, the applicant's Group Industrial Relations Manager had no authority to depose to the founding affidavit. However, and notwithstanding the fact that on 8 March 2013 Kevin Terry, Deputy Chief Executive Officer of Old Mutual in charge of applicant, had filed an affidavit, the respondent still stood by her point in *limine*. She argued that Kevin Terry could not, without a Board resolution purport to represent the applicant.

The applicant, relying heavily on *Mall (Cape) (Pty) Ltd* v *Merino-Ko- Operasie BPK* 1957 (2) SA347, submitted that Stanley Chinakidzwa as Group Industrial Relations Manager had the necessary knowledge of industrial relations matters. The applicant quoted from Mall, *supra,* as follows:

> "The best evidence that the proceedings have been properly authorised would be approved by an affidavit made by an official of the company annexing a copy of the resolution but I do not consider that form of proof necessary in every case. Each case must be considered on its own merits and the court must decide whether enough has been placed before it to warrant the conclusion that it is the applicant who is litigating and not some authorised person on its behalf. Where, as in the present case, the respondent has

then I consider that a minimum of evidence will be required from the applicant (see *CF Parsons* v *Barkley East Municipality* (*supra*), *Thelma Court Flats (Pty) Ltd* v *McSwigin 1954* (3) SA457 (C).” (emphasis supplied)

I agree with the above and am satisfied that the deponent to the founding affidavit herein falls within the requirements of law. Indeed, I also agree with applicant that it is not in all cases that a resolution must be in place. The deponent *in casu*, in my view, is the person who can swear positively to industrial relations matters. This is a matter based on industrial relations and the deponent is the Group Industrial Relations Manager. He is therefore equipped with the facts relating to the matter.

I am further unable to ignore the authority the deponent to the affidavit obtained from the Deputy Chief Executive Officer of the applicant.

In view of the foregoing, I cannot therefore uphold the point in *limine.* (See also *African Banking Corporation of Zimbabwe Limited t/a BANCABC* v *PWC Motors (Pvt) Ltd and Ors* HH123/2013).

Coming to the merits of the matter, it is common cause that the applicant paid US$32 000-00 as the purchase price of the vehicle and the respondent received a formal loan of US$20 000-00 from the applicant in order for him to pay duty for the vehicle. The vehicle could only be registered in either the name of the applicant or respondent upon payment of duty.

Rules 4-6 of the applicant’s Management Motor Car Scheme Rules provide as follows:-

“4. The appropriate benchmark vehicle will be reviewed periodically, to take account of updated vehicle models. The specified limit will be based on the value of the benchmark vehicle for the grade.
New cars are preferred, as these are more reliable and should cost less to maintain. Second hand cars purchased should be less than three years old, have mileage of less than 15 000kms and should be a model that is supported by an authorised dealer in Zimbabwe.
The selling price to the individual at the end of the 5 year period will be at a reasonable market value after taking into account any excess paid by the individual (The equivalent period for Grade S2 is 6 years).
With effect from May 2009, all vehicles on the management motor car scheme which will be issued after that date will be sold to the individual after the expiry of the benefit period at a reasonable market price which also takes into account the proportion paid as excess by the individual. In the event that the individual fails to pay, or is not interested in buying the vehicle, it will be returned to the company immediately.
Those wishing to acquire a vehicle in excess of the limit will be able to do so provided they pay the difference in cash AT THE TIME OF ACQUISITION. The proportion of this excess will be taken into account after the expiry of the benefit period.

> It is accepted that an appropriate company car is an important part of a competitive remuneration package within Zimbabwe. However, the group would like to move away from the provision of specific cars in the medium term, once prices, interest rates and exchange rates are more stable.
> 6. Registration and Ownership
> The vehicle will be registered in the Company's name and will remain the property of the Company until disposed of by the Company."

The applicant also has in place an allocation for the running costs of vehicles bought under the scheme. The allocation covers maintenance, licensing levies etc and is closely monitored by the applicant's Fleet Management Unit. That unit is also responsible for the insurance of the vehicle so allocated.

It will be seen from the portion of her opposing affidavit, quoted at page 2 herein, that the respondent's contention is that her entitlement to the vehicle fell outside the official scheme. Indeed if that is the case, this application should fail.

What is before the court is an action *rei vindicatio*. In the main, all the applicant has to do is to prove ownership and current possession of its property by the respondent.

The respondent can in turn:-

a) Challenge ownership by applicant

b) Prove return of property to the respondent.

c) Prove *bona fide* disposal of property.

d) Claim right of possession

e) Deny possession of the property

(See Anler's *Precedents of Pleadings* Fifth Ed by LTG Harms at p 408-409)

In *casu* the applicant has indeed challenged the applicant's ownership of the vehicle mainly because, as she argued, her entitlement to the vehicle was outside the applicant's Management Motor Car Scheme Rules. She denies being a beneficiary under the scheme.

The applicable law in matters of this nature is spelt out in *Zimbabwe Broadcasting Holdings* v *Gono* 2010 (1) ZLR where it is stated:-

> "Our law is to the effect that once an employee has been suspended or dismissed from employment, any benefits extended to such employee from the relationship cease. In *Chispite Schools Trust (Pvt) Ltd* v *Clarke* 1992 (2) ZLR 324 (S) GUBBAY CJ stated;
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> > "Pending the removal of the suspension, the respondent was not entitled to continued enjoyment of the benefits comprising the free occupation of the headmistress' house and the continued use of the motor vehicle. A labour relations 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 applicant 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 recognisable defence to the claim by the applicant for the return of its property."
> See *Stanbic Finance Zimbabwe Ltd* v *Chivhunga* 1999 (1) ZLR 262 (H) and *Mashave* v *Standard Bank of SA* 1998 (1) ZLR 436 (S). In the latter case, the Supreme Court per MC NALLY JA @ 438 C-D stated authoritatively;
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> > "The Roman-Dutch law protects the right of an owner to vindicate his property and as a matter of policy favours him against an innocent purchaser. See for instance *Chetty* v *Naidoo* 1974 (3) SA 13 (A) @ 20 A-C. The innocent purchaser's only defence is estoppel."

The above law clearly applies to a suspended or dismissed employee. This is so because the employment benefits will be linked to the provision of service to the employer through a contract of employment. Generally, it is therefore reasonable that the benefits should cease when the contract of employment is suspended or terminated. Under such a situation the employer is clothed with the capacity to determine the fate of the benefits he would have placed in the employee's hands when all was well. However, each particular case will dictate how the law enunciated in *Zimbabwe Broadcasting Holdings*, *supra*, will apply.

In *casu* the issue that arises is a determination of whether or not the respondent fell under the rules of the applicant's Management Motor Car Scheme. The papers before me tell a different story. The papers give the respondent partial ownership of the vehicle (i.e. 38% ownership). That alone takes the case away from Zimbabwe Broadcasting Holdings, *supra*. The case is distinguishable. That problem of partial ownership would, necessarily have to be resolved before the respondent surrenders that vehicle to the applicant.

I also note that the vehicle is still registered in the name of the third party from whom it was purchased.

In her opposing papers the respondent indicated that her participation in the applicant's scheme was hampered by Phillip Cameron, the then General Manager for Credit and Administration in applicant. When he refused her application to pay for the vehicle in full, she was then "advanced" part of the purchase price. Rule 4 of the scheme indicates that where approval is granted for the purchase of a vehicle, the employee can only be asked to pay the "excess" – where necessary. The problem of partial ownership *in casu* arises from the fact that, on 18 August 2011, the applicant's decision on the purchase of the vehicle was:-

"The society will pay a maximum of $32 000. Mrs Magodo must pay the duty due."

Clearly the parties bought the vehicle jointly. Nowhere are we told, in the papers, that the scheme required participants to pay duty. There is only mention of an "excess on the purchase price". Added to the above, according to the applicant's scheme:

> "New cars are preferred, as these are more reliable and should cost less to maintain. Second hand cars purchased should be less than three years old, have mileage of less than 15 000kms and should be a model that is supported by an authorised dealer in Zimbabwe."

The above was not the position with regards to the respondent. In its answering affidavit the applicant lays out the respondent's particular circumstances in the following manner:-

> "7. In this particular case, the respondent was entitled to a motor vehicle up to a value of USD25 000.00. The respondent, however, convinced her then immediate superior to increase this to USD32 000.00 which was done. However, the motor vehicle which the respondent intended to buy was owned by an Embassy staff (Iranian Embassy). The motor vehicle in question when it came into the country had not paid duty and what it meant was that upon disposal duty had to be paid. In this regard, I attach herewith a pro-forma invoice from Borrowdale Auto the garage at which the motor vehicle was sold. The pro-forma invoice is attached hereto marked 'A'. In terms of Annexure 'A' the purchase price was USD32 000.00 and the Zimra duty was USD 20 000.00. There was an endorsement in longhand to the effect that the Society will pay USD 32 000.00 and Mrs Magodo must pay the duty. This was signed by Mr Cameron the then respondent's superior."

It is my view that with regards to the applicant's circumstances, the applicant came up with a totally different arrangement which was confirmed in writing by Mr Cameron. That arrangement did not comply with the applicant's scheme. The 'excess' payable, in my view, would have been USD7 000-00. That was never known to be given as a loan but would be considered when an employee exercised the option to purchase.

The respondent also went on to state that she maintained the vehicle on her own except for the insurance paid by the "joint owner". I do not think that anyone can doubt the insurable interest of the applicant in the vehicle. It paid $32 000 towards its purchase (i.e. 62% ownership) and gave a loan of $20 000 to the respondent for duty payable. Surely no ownership would pass to either party, without payment of duty. For the car to be registered both parties had to attend to the requisite payments together. That is not what the Motor car Scheme contemplated. We have, in *casu*, a situation where it is also clear that delivery of the vehicle was made directly to the respondent. That is why up to this day the applicant does not know whether or not duty was ever paid.

The vehicle was bought in August 2011 and the respondent was suspended on 8 October 2012. For over a year the applicant did not deem it necessary to register the vehicle in its

name as per rule 6 of its Scheme. That is so because the respondent's arrangement fell outside the general scheme. The applicant had no control over the vehicle apart from paying insurance due to the insurable interest referred to above. It had, as already shown, an insurable interest in the vehicle.

It is, in my view, the respondent's clear partial ownership of the vehicle that distinguishes this matter from other ordinary labour matters where after suspension or termination of contract an employee is obliged to surrender the employer's assets attaching to him as benefits.

Apart from the loan of $20 000, the respondent appears to have also accepted an "advance" of $32 000. She does not deny that and that is how the vehicle came into her possession. It is up to the parties to agree on how to deal with the said sum of $32 000. The other sum of $20 000 was a formal loan.

In view of the foregoing I do not find it in the interest of justice to order the respondent at this stage, to surrender the vehicle to the applicant. She is a partial owner who fell outside the applicant's car scheme.

Given the circumstances of the case, I think it would also be in the interest of justice for each party to bear its own costs.

I therefore order as follows:-

1) The application be and is hereby dismissed; and
2) Each party shall bear its own costs.

Messrs Atherstone & Cook, applicant's legal practitioners
Messrs Venturas and Samukange, respondent's legal practitioners