Judgment No. HB 50/2004
Case No. HC 2626/02

DR C DHEGE

Versus

BELL MEDICAL CENTRE

IN THE HIGH COURT OF ZIMBABWE
NDOU J
BULAWAYO 16 MAY 2003 AND 1 APRIL 2004

Ndebele, for applicant
N Mahori for respondent

Opposed Application

NDOU J: Sometime in 1996 the applicant entered into a contract of employment with ZISCO Steel. That same year the applicant was issued with a motor vehicle being a Mazda 323. The said vehicle was issued under ZISCO Steel policy document 802 which reads, *inter alia,*

> "(a) For the first three years from the date of purchase the car shall remain the property of the company and shall not be subject to re-sale.
> (b) After expiry of 3 years from the date of purchase the company may offer the car for sale to the employee to whom the car had been issued for business or personal use.
> (c) The employee should have possessed the car for no less than three consecutive years."

On 9 April 1997 the applicant was appointed Chief Medical Officer by ZISCO Steel and around the same time he was issued with a Peugeot 405 registration number 640-427Q.

In 1999 ZISCO Steel Hospitals were sold as a going concern to Bell Medical Centre, the respondent. ZISCO Steel also sold the above mentioned Peugeot vehicle to the respondent for $147 000,00. Since ZISCO Steel had sold the hospitals to the respondent all medical employees were likewise transferred to the respondent. The applicant was one of the employees transferred to the respondent. The respondent

drafted new contracts for all such employees. The new contract between the applicant and the respondent did not address the issue of whether or not the applicant was still entitled to purchase the vehicle after three years. In addition, the new contract took away some benefits which the applicant was entitled to such as telephone allowance, electricity and water allowance and domestic worker allowance and there had been several charges in relation to applicant's sick leave etc. The applicant queried this. Various discussions were entered into and after negotiations the applicant understood that his transfer from ZISCO Steel to respondent was on conditions which were not less favourable than those that had applied immediately before the transfer. It is his case, therefore, that his employment was not interrupted. On 18 November 2001 the applicant wrote to the respondent stating that he had been issued the disputed car under ZISCO Steel policy document which gave him a right to purchase (after three years) and that he wished to exercise that right. The respondent did not respond to that letter. On 29 April 2002 the applicant resigned from the respondent. Upon his resignation he took the disputed vehicle with him and offered to pay the purchase price as calculated by the respondent. At that stage he has used the vehicle for around five years and he believes he was entitled to purchase it for 20% of the original purchase price as per above mentioned ZISCO Steel policy document.

On 25 June 2002 the respondent wrote a letter to the applicant demanding that the latter returns the disputed vehicle and threatened making a report to the police if he does not do so. There were correspondences between the parties' legal practitioners which did not yield anything positive. Ultimately, on 5 August 2002, the applicant was arrested at the behest of the respondent and charged under the Road

Traffic Act in respect of his failure to return the vehicle. This resulted in this application wherein the applicant seeks an order in the following terms:

> "It is ordered that:
>
> 1. Respondent is compelled to sell the Peugeot 405 registration No. 640-427Q to applicant for 20% of the original purchase price within 14 days.
> 2. Respondent bears the costs of this application on an attorney-client scale."

In addition to the opposing the application, the respondent filed a counter application seeking an order in the following terms:

> "It is ordered:
>
> 1. That the applicant be and is hereby ordered to return motor vehicle, Peugeot 504 (sic) GR, registration number 640-427Q to Bells Medical Centre within forty-eight (48) hours of service of this order on him.
> 2. That, in the event that the applicant fails to comply with the above order, the deputy Sheriff, Kwekwe is authorised to take the motor vehicle from the applicant and hand it over to the respondent at Torwood Hospital, Redcliff.
> 3. That the applicant pays the costs of this application."

It goes without saying that the applicant opposes the counter application.

The applicant's case is mainly dependent on the interpretation of section 16 of the Labour Relations Act [*Chapter 28:01*]. The applicant has confined his case to the provisions of subsection (1) of section 16 which provides:

> "Subject to this section, whenever any undertaking in which any persons are employed is alienated or transferred in any way whatsoever, the employment of such persons shall, unless otherwise lawfully terminated be deemed to be transferred to the transferee of the undertaking on terms and conditions which are not less favourable than those which applied immediately before the transfer, and the continuity of employment of such employees shall be deemed not to have been interrupted."

The respondent's case is that even if it offered less favourable conditions, a point made but not conceded, it would still be proper in terms of subsection (2) (b) if the employee accepted these less favourable conditions. Section 16 (2) (b) provides-

> "(2) Nothing in subsection (1) shall be deemed –
>
> (a) to prevent the employees concerned from being transferred on terms and conditions of employment which are more favourable to them than those which applied immediately before the transfer, or from obtaining terms and conditions of employment which are more favourable than those which applied immediately before or subsequent to the transfer;
>
> (b) to prevent the employees concerned from agreeing to terms and conditions of employment which are in themselves otherwise legal and which shall be applicable on and after the transfer but which are less favourable than those which applied to them immediately before the transfer:
> Provided that no rights to social security, pensions, gratuities or other retirement benefits may be diminished by any such agreement without prior written authority of the Minister.
>
> (c) to affect the rights of the employees concerned which they could have enforced against the person, who employed them immediately before the transfer, and such rights may be enforced against either the employer or the person to whom the undertaking has been transferred or against both such persons at any time prior to, on or after the transfer;
>
> (d) to derogate from or prejudice the benefits or rights conferred upon employees under the law relating to insolvency.
>
> (3) It shall be an unfair labour practice to violate or evade or to attempt to violate or evade in any way the provisions of this section."

As alluded to above, it is beyond dispute that ZISCO Steel sold all its hospitals to the respondent as a going concern and as such the respondent was obliged to employ all employees in terms of section 16 supra. There has been a transfer of business. The test generally used being "whether the effect of the transaction was to put the transferee in possession of a going concern the activities of which he could carry on without interruption". There has been, *in casu*, sale of the whole business of running the affected hospitals – *Kenmirch Ltd* v *Frizzell* [1968] 1 WLR 329 at 335; *Lloyd* v *Brassey* [1969] 2 QB and *Woodhouse* v *Peter Brotherhood Ltd* [1972] I CR

186. These English cases deal with their legislative provisions relating to the effect of transfer of a trade business or undertaking similar to our section 16, supra, [Schedule 13, paragraph 17 (2) of 1978, Employment Protection (Consolidation) Act].

My understanding is that subsection (1) of section 16 *supra*, provides a general rule that employees shall not be offered less favourable conditions on such transfer or alienation of the going concern. Sub section (2) (b) provides an exception to this general rule and it would be proper for the employees to accept less favourable conditions. The fact that that applicant signed the new contract of employment after some deliberations and negotiations, implies that when he put his hand to sign the contract on 8 January 1999, he fully accepted the terms and conditions therein in an informed manner. The contract of employment is consensual. The parties may agree on whatever terms they wish, provided they are consistent with the nature of the employment relationship and are neither illegal nor *contra bonos mores – Riekert's Basic Employment Law* (2nd Ed) by John Grogan at page 23. In the circumstances, the respondent did not violate the provisions of section 16(1) of the Act. Respondent properly acted in terms of section 16(2)(b) of the Act.

Further in terms of the aforesaid ZISCO Steel policy 802 and 803, the option to sell the company car to an employee is discretionary. The wording of the relevant clause clearly shows that it is not mandatory for the company to sell the car to the employee. The operative words, "the company <u>may</u> offer the car for sale" (emphasis added) clearly shows that intention. It does not say the company <u>shall</u> sell the car. In the circumstances, it cannot be argued that the respondent, as successor to ZISCO Steel, was obliged to sell the company car to applicant. The court cannot compel a party to exercise its discretion in a particular fashion. The court can compel a party to

do what is mandatory in terms of an existing agreement. The right to purchase the company car could only be exercised after an offer had been made to the employee and not before. The option to offer for sale, cars used by employees was a privilege and not a right. Since the employer could choose either to sell or not to sell, the employee cannot claim a right to purchase. Such privileges are customarily voluntarily introduced by employers with the object of maintaining a stable and contended labour force. Although the applicant claims that ZISCO Steel always sold its cars to managerial employees, no proof has been offered. Besides, even it is accepted that that practice existed, it does not convert a privilege into a right – *Foreman & Anor* v *KLM Royal, Dutch Airlines* 2001 (1) ZLR 108 (H).

In that case, it was held that past practice does not transform a privilege into a right. At p 112G-H GWAUNZA J as she was then, stated-

> "The very essence of a privilege is that it can be granted or not granted at the discretion of whoever has authority to do so. While there may be , as is the case in *casu*, guidelines governing the exercise of such discretion, the discretion itself remains and one cannot be forced to exercise it in a particular way. Nor can one talk of a privilege having been infringed."

See also *Chairman, Public Service Commission & Ors* v *ZIMTA & Ors* 1996 (1) ZLR 637 (S) at 651G-655B. From the foregoing, the respondent did not breach the provisions of section 16 of the Labour Relations Act as the applicant understandingly entered into a new contract of employment with respondent in terms of subsection (2) (b). Furthermore, the respondent, as successor to ZISCO Steel, had a discretion in its option to offer the car for sale to the applicant.

Accordingly, the applicant's application is dismissed with costs and the respondent's counter application for an order for the return of the motor vehicle,

Peugeot 405 registration number 640-427Q is granted with costs in terms of the abovementioned draft.

Mhuruyengwe & Associates (c/o Calderwood, Bryce Hendrie & Partners), applicant's legal practitioners
Wilmot & Bennet (c/o Ben Baron & Partners), respondent's legal practitioners