ONAI MAKAMURE
versus
DEVON ENGINEERING (PVT) LTD

HIGH COURT OF ZIMBABWE
GOWORA J
HARARE 14 March and 26 November 2008

Mrs *J B Wood*, for the applicant
H Zhou, for the respondent

GOWORA J: On 8 October 2007, this court granted the applicant a provisional order in terms whereof the applicant was granted the right to retain possession of a Mazda B1800 registration No AAG 9397. Part of the order gave the applicant the obligation to retain the vehicle in a safe place and ensure that it was not damaged or destroyed. The applicant has now sought an order in the final terms of the provisional order as follows:

That you show cause to this Honourable Court why a final order should not be made in the following terms:

1. That pending the determination of the matter in Case No HC 5252/07 wherein the applicant is applying for an order for specific performance compelling the Respondent to comply with the employment contract and policy on motor vehicle usage and offer the applicant the Mazda B1800 to purchase at the current market value of that vehicle, the applicant shall retain possession of Mazda B1800 Reg. No AAG 9397

2. Pending the determination of the matter in Case No HC 5252/07 applicant shall keep the Mazda B 1800 Reg. No AAG 9397 in a secure place and is hereby interdicted from lending the vehicle to any third party and shall undertake to ensure that the vehicle is not damaged or destroyed

3. That pending the determination of the matter in Case No HC 5252/07 the applicant shall not sell or in any manner dispose of the Mazda Reg. No B 1800 Reg. No AAG 9397.

The facts surrounding the dispute are these. The applicant was employed by the respondent as a projects engineer with effect from 25 August 2003. As part of his employment package he was entitled to the use of a company vehicle allocated to his exclusive use for both business and personal use. He resigned for his employment with the respondent on 9 July 2007 and at the request of the respondent he left employment on 1 August without serving his notice period. The applicant had been allocated a Mazda B 1800 Reg. No AAG 9397 at the time that he assumed his employment. When he left employment he took the vehicle with him and the respondent demanded its return. A perusal of HC 5252/07 shows that the plaintiff issued summons on 25 September 2007 and apart from the demand for further particulars by the defendant and the furnishing of the same by the plaintiff no real progress has been made in having the claim prosecuted. The respondent has not filed a plea. The defendant has not been put on terms by the plaintiff and it appears that neither party is in any hurry for the matter to be concluded. Litigants must refrain from seeking relief in an urgent manner where such relief is dependant on the conclusion of an action launched or to be launched. When one considers that a court sets aside its normal business to deal with the urgent application only for the litigants therein to then take their time in having the dispute concluded it becomes obvious that the urgent application system is being abused. Where the provisional order subject to a return date the parties would in my view make haste to have their dispute concluded prior to the expiry of the return date.

In the summons the applicant is seeking, amongst other relief, an order compelling the respondent to sell the vehicle to him in accordance with the company vehicle policy. In order to avoid making factual findings that would compromise the court hearing the main action between the parties, I have considered whether I can determine this matter without an attempt at interpreting the vehicle policy document but it seems that I cannot avoid doing so. The applicant has made the contents of the document the basis for his entitlement to hold on to the vehicle pending the conclusion of the claim for specific performance. My comments arise from the following statement in the founding affidavit:

> "9. I advised the Respondent that I wanted to exercise the option to purchase the vehicle, Mazda B 1800 Registration No. AAG 9397 in terms of clause 23 of the motor vehicle policy Annexure 'B' because I had use of that vehicle for a period in excess of three years and in terms of the policy the respondent had to dispose of the vehicle and give me the first option to purchase the vehicle".

The respondent in turn denies that the applicant has an option to purchase but has instead a right of first refusal, and that the two concepts are very distinct. An examination of the clause is therefore unavoidable.

The clause in the policy is worded as follows:

"Vehicles shall be disposed of:-

23.1 In the case of assigned vehicles, after three years of continuous use by the concerned employee and where applicable subject to the Lease Hire Company's laid down conditions. The user will be given right of first refusal to purchase the assigned vehicle at a price to be determined by reference to the Lease Hire Company's laid down value or any other value as determined by the Executive Directors".

The first issue for determination is the exact right that the applicant was given in the clause contained in the vehicle policy as it relates to his contract of employment. According to the respondent the applicant was given a right of first refusal. The applicant in the founding affidavit referred to the right as an option to purchase. It is in the replying affidavit that the applicant admits that what he was given was a right of first refusal. In the heads of argument however it seems that the applicant still contends that he had the right to purchase the vehicle. It is clear therefore that the two parties to the dispute each a different construction on the right given to the applicant in terms of the vehicle policy of the respondent. The difference between an option to purchase and a right of first refusal was discussed at length in *Cohen v Behr*[1], which is a judgment by DE VILLIERS J as he then was. At p 947 the learned judge quoted the following passage from the judgment of WILLIAMS L.J. from *Manchester Ship Canal Company v Manchester Race Course Company*[2]*:*

> "There appears to be two possible meanings of the words 'first refusal'; one is that they mean the opportunity of refusing a 'fair and reasonable' offer by the Race Course Company to sell the land en bloc to the Canal Company; the other is that they mean the opportunity of refusing the land at a price acceptable to the Race Course Company offered by some person other than the Canal Company, which is what I understand by the term 'right of pre-emption'…….The agreement does not provide that the first refusal shall be given at any particular price or on any particular terms; nor that the price and other terms shall be ascertained by arbitration or in any other way. Looking at these circumstances, I think there is at least fair ground for the contention that the

[1] 1946 CPD 942
[2] (84 LTR 436)

> clause only imports that the Race Course Company shall, in either of the prescribed events, make a fair and reasonable offer to sell the land to the Canal Company, and I wish to consider the case from this point of view, which is the view most favourable to the defendants……..I think that the very words 'first refusal' in clause 3 import that the price at which the Race Course Company give the Canal Company the 'first refusal' is a price at which the Canal Company will offer the land to other would be buyers in the event of the refusal of the Canal Company to but at that price……The contract here to give Canal Company the 'first refusal' involves a negative contract not to part with the land to any other company or person without giving that first refusal".

A more concise description of the term was given by GWAUNZA J (as she then was) in *Sawyer v Chioza*[3] whereat she said the following:

> "Cooper Landlord and Tenant at p 143 aptly summaries the grantor's obligations in relation to the exercise by the grantee of his right of pre-emption:
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> "An agreement of pre-emption contains both a negative and a positive element. The negative element is that the grantor is restrained from selling to a third party, the positive element is once he is prepared to sell he is under obligation to sell to the grantee".

In my view, the above captions describe the essential elements of the right of pre-emption (or first refusal) in terms that are both clear and unambiguous. My reading of these requirements is that the following steps must, in that sequence, be followed in the exercise of the right of pre-emption:

a) a specific third part offers to buy the property at a given price ;

b) the grantor is prepared to sell at that price; but

c) before accepting the buyer's offer, the grantor reverts to the right of pre-emption, informs him of his decision to sell at the price offered by the particular buyer and asks him (grantee) to exercise his right of first refusal.

Thereafter, the outcome, in terms of who ends up buying the property, depends on the grantee's decision on whether to exercise his right….. "

I can put it no better than has been said in the two judgments I have quoted above. What emerges therefore is that for a right of first refusal to be exercisable there must be an offer made for the property which is subject to the right. At that stage the obligation of the

[3] 1999 (1) ZLR 203 at 207C-G

grantor, before accepting the offer made with a specific price is to offer the property for sale to the grantee to purchase at the price being offered by the third party. The grantee is then at liberty to accept or refuse the offer made to him. Thus are the conditions of first refusal satisfied.

In *casu*, the applicant wishes the court to recognize a right of first refusal. There is indeed an agreement offering him a right of per-emption. There is however no offer on the table for the respondent to accept. There is no third party vying to purchase the same item from the respondent. There is no price specified on the vehicle, and it seems to me that the applicant cannot exercise a right of pre-emption in a vacuum. A right of pre-emption of first refusal entitles the holder to the first opportunity of buying if the seller decides to sell. It is a right that is exercised upon the fulfillment of a condition and in this case no circumstances have occurred that would result in there being such a condition coming into fruition.

This conclusion leads to me consider the next issue for determination, that is whether or not the respondent can be compelled to offer its vehicle for sale in order that the applicant may then exercise a right of pre-emption. The grantor of a right of pre-emption cannot be compelled to sell the subject of the right. Should he, however, decide to do so, he is obliged, before executing his decision to sell, to offer the property to the grantee of the right of pre-emption upon the terms reflected in the contract creating that right. See *Ownsinick v African Consolidated Theatres (Pvt) Ltd*[4]. In *Hirschowitz v Moolman and Others*[5] COETZEE J stated:

> "There seems to be no doubt that *Sher's* case reflects our common law on this point. The pre-emptive right in *casu* is substantially identical with that considered in *Sher's* case. I agree therefore with appellant's counsel that it is one in which there is no 'option' price nor any express reference to the price which a stranger might offer but it is nonetheless to be regarded in its effect as an enforceable undertaking to offer the subject matter thereof first to the appellant at the same price as the owner is prepared to accept from a third party. That undertaking is not a sale nor yet an offer to sell-it only compels the grantor to give the grantee the preference in case he sells at all (*Van Pletsen v Henning 1913 A D 82 at 95"*.

In his replying affidavit the applicant seems to suggest that what he wishes is for the respondent to be compelled to offer the vehicle to him for sale. Based on the common law principle on the right of pre-emption the applicant does not have the right to demand that the vehicle be sold to him. The clause 'shall dispose of' in the policy document seems to compel

[4] 1967 (3) 310 at 316.
[5] 1983 (4) 1 at p 6D-F

the respondent to dispose of a vehicle after the expiration of a certain period of use. I do not believe that the clause should be read as imposing an obligation upon the respondent to do so nor do I accept the contention that the respondent is in that clause compelled to offer the vehicle for sale to the user. I am inclined to believe that the intention in the document was to set a period by which a vehicle could be disposed of. If cannot have been meant as imposing an obligation to the respondent to dispose of the vehicle once such a period had lapsed. Nor did the applicant thereby acquire a right to purchase the vehicle upon the expiration of the period in question. As a consequence his retention of the vehicle is without proper or legal foundation.

I turn now to the issue of the interdict. An examination of the provisional order reveals that the interdict was against the applicant and was meant to operate during the period of his retention of the vehicle. In view of my finding that he has no legal entitlement to retention of the vehicle the interdict falls away upon his return of the vehicle to the respondent. In the premises the provisional order must be discharged. I therefore make an order as follows. The application be and is hereby dismissed with costs.

Byron Venturas and Partners, legal practitioners for the applicant.
S Takundwa & Company, legal practitioners for the respondent.