

FIRSTEL CELLULAR (PRIVATE) LIMITED
versus
MUNYARADZI CHRISTOPHER SEFAIDIGA
and
BLESSING GIBSON MUNYORO

HIGH COURT OF ZIMBABWE
HUNGWE J
HARARE, 22 February 2012

G Chingoma, for the applicant
I Chagonda, for the respondents

Opposed Application

HUNGWE J: On the return day of the rule nisi I confirmed the provisional order and dismissed the counter application indicating that the reasons will follow. These are the reasons. This is the return day of the rule nisi issued by this court on 10 May 2007 interdicting the two respondents (applicants in the counter-application hereinafter referred to as “respondents” or “first and second respondents”) from using applicant’s (respondent in the counter-application hereinafter referred to as “applicant”) two Mercedes Benz motor vehicles registration numbers AAA 3378 and AAA 4417 and directing the respondents to surrender to applicant the said motor vehicles immediately. Applicant undertook not to re-allocate two of its senior staff members they said motor vehicles pending the return day. The respondents complied with the terms of the order requiring them to surrender to the applicant but have filed a counter-application seeking an order that the present applicant be ordered to surrender the two motor vehicles to the respondents upon tender and payment of the amount due to it for the value of the two motor vehicles. This application and counter application arose out of the following facts:

Applicant employed the first and second respondents as Financed Director and Operations Director respectively. Applicant is the lawful owner of the two Mercedes

Benz motor vehicles. It allocated the use of the motor vehicles to the respondents in terms of its company vehicle policy. Sometime in February 2007 applicant's board of directors had reason to cause a forensic audit to be carried out within the applicant. A forensic audit report produced after the audit investigations revealed possible fraudulent and prejudicial conduct by the two respondents. The forensic audit report which is part of the papers reveals that the investigations included seeking explanations from the respondents and recording such explanations as they would have given. When the findings and conclusions of the forensic audit report were put to the respondents, they both offered to resign with immediate effect. They both refused to hand over the two vehicles on the ground that they were entitled to purchase the motor vehicles from the applicant. This necessitated the chamber application resulting in the present litigation. Applicant argues that the provisional order should be confirmed as the final order since (a) the applicant has not, in the exercise of its discretion, granted the two respondents the option to purchase the two motor vehicles and (b) the employees leaving its service are required to surrender the vehicles.

The first and second respondents, on the other hand, contend that the provisional order be discharged and that the applicant be directed to surrender the two motor vehicles to them up on tender of the value of the motor vehicles.

The respondents ground their counter- application on the following basis. During their term of employment with the applicant, applicant came up with an executive car policy which governed the acquisition and use of motor vehicles by senior employees. First and second respondents contend that the scheme entitled them to exercise an option to purchase the motor vehicles which they were using at the time of resignation. Upon resignation, the respondents notified the applicant that they were exercising the option to purchase the motor vehicles for which the purchase price would be fixed in accordance with the applicant's executive car policy.

The right to the motor vehicle accrued at the time of the purchase of the motor vehicle, this is demonstrated by the registration of the motor vehicle in the respondents' names. They contend that they are entitled, upon exercise of the option, to the motor

vehicles. The respondents also draw the court's attention to the fact of that they are in a possession of the two motor vehicles' registration books.

The issue in this dispute in my view is whether, upon a proper interpretation of the applicant's motor vehicle policy scheme, the respondents have an enforceable right to purchase the two motor vehicles. Put differently, did the counter- applicants hold an option exercisable against the counter- respondents to purchase the two motor vehicles upon their resignation from employment? In order to answer this question, regard must be had to the document which both parties agree governed the use of motor vehicles by the first and second respondents.

In interpreting the document the court will give effect to the ordinary grammatical meaning of the words used unless the context clearly requires otherwise. It will be clear from the opening paragraph of the executive car policy document that it was formulated so as to uphold the principle of ensuring improved welfare of applicant's key staff through the provision of a motor vehicle benefit designed to motivate and retain skilled personnel.

Clause 4 deals with the replacement period of the vehicle. It states that a company vehicle shall be due for a replacement or renewal after a period of five years from the date of manufacture. Clause 5 goes on to spell out that the executive using the vehicle due for a replacement will be given the first option to purchase the vehicle and the fixing of the price. It states that an application to exercise the option to purchase the vehicle will be processed in line with the relevant provisions of the policy. That same paragraph gives detail to what happens when an employee is promoted to a higher grade. Clause 6 is titled **Vehicle Operating Expenses** and sets out what the employer will pay for. Clause 7 spells out the responsibilities of the company vehicle operator. Clause 8 is titled **Administration and Control**. In terms of this clause the Group Company Secretary keeps custody of the motor vehicle registration books at all times even though at purchase, the motor vehicle is registered in the name of the employee in terms of clause 2. Management reserved the right to withdraw the company car facility at its discretion where there is evidence of abuse of allocated vehicle in terms of clause 8. Under clause 8 as well, an employee who leaves the company is required to surrender the vehicle and all

accessories to the group managing director with the option provided for them to purchase the vehicle as provided for under clause 5.

Clause 9 deals with interpretation and application of the policy and states that this is the responsibility of the board. Clause 10 specifically States that "...all provisions under this policy are at the discretion of the group managing director or chairman of the board subject to cash flow availability." The first and second respondents argue that Clause 8 creates the option which they exercised by written notice of election to purchase the vehicles upon their resignation. The question that arises is whether the option in clause 8 creates legally binding consequences between the parties. In other words: is the "option" an option in the legal sense of the word?

The Dictionary of Legal Words and Phrases 2nd edition, Vol. 3 @ p45 defines an option as follows;

"An option is an 'offer' which is irrevocable by the grantor during the period stipulated in the contract or, if there be no such provision, within a reasonably time. See also: *Van Pletzen v Henning* 1913 AD 98; *Annamma v Moodley* 1943 AD 538; *Hersch v Nel* 1948 (4) SA 695; *Brand v Spies* 1960 (4) SA 14. If the option be exercised, the potential contract contemplated by the parties to the option agreement is complete."

It is contented on behalf of both the respondents that applicant made an irrevocable offer in clause 8 of its policy.

In *Bilodeh Properties (Pty) Ltd v Wilson* 1946 NPD 736 @ 744 an option was defined thus:

"A true option is nothing more than an offer by one party to the contract to the other, which offer remains open according to the terms of the contract. The option holder has merely to accept the offer in the manner and within the time prescribed by the contract, and a new contract comes into existence between him and the other party...."

In *Wasmuth v Jacobs* 1987 (3) SA 629 (SWA) it was explained that:

"An option constitutes nothing more than an offer coupled with an arrangement (express or implied) to keep the offer open for a certain period of timeIt is fundamental to the nature of any offer that it should be certain and definite in its terms. It must be firm, that is, made with the intention that when it is accepted, it

will bind the offeror. (*Efroiken v Simon* 1921 CPD 367 @ 370; *Finestone v Hamburg* 1907 TS 629 @632).....

Therefore, if an offer which is an essential element of any option is vague on all capable of more than one meaning, it is open to the offeror to contend that it is not capable of being accepted and thereby convert it into a binding contract. Where there is an 'offer' which provides that certain terms were to be 'renewed' or to be 'negotiated' or to 'stand over' for decision at a later stage, then pending agreement, on such outstanding terms neither party has any rights against the other." *Ok Bazaars v Bloch* WLD 37; *Wilson Bros Garage v Texas Co (SA) Ltd* 1936 NPD 386.

See also *Film and Video Trust v Mahovo Enterprises (Pvt) Ltd* 1993 (2) ZLR 191

(H)

The contention by the respondents is that the provisions of clause 8 constitute an option exercisable against the applicant. Once exercised, it became binding. I disagree.

It will be clear from the above authorities that even assuming in favor of the first and second respondents that "option" existed there is no offer capable of such acceptance by offeree as would legally bind the offeror. There is no definite period within which the "option" would remain open. The terms of the offer cannot be implied. It is not contended that the terms of the sell agreement was spelt out expressly since price of the motor vehicles was not yet fixed. In any event there is repeated reference to the discretion of the management in clause 5 to which clause 8 refers, such that it cannot be said with certainty that there existed a formula to fix a price as the decision to sell depended on the discretion of management.

I am fortified in my interpretation by the principle espoused at the commencement of the policy document that the intention was never to make the document a contract which binds the employer to sell its motor vehicles once an employee applied for that. The document makes it clear that the policy is to retain personnel not to reward ex-employees. Such a benefit can only be extended to an ex-employee if, in the discretion of management or board of directors, such employee merited it. That is not the position here. In any event that is not the interpretation given to the policy document by the parties. The fact that the applicant allowed its vehicles to be registered in its employees names cannot, in my view, be construed as bestowing any right to purchase the motor

vehicles on the employees. It does not advance the respondents' argument nor does it to destroy the applicant's argument. It merely reinforces the spirit espoused by the policy which is to retain key personnel and nothing more. In my view the two motor vehicles remain the property of the applicant. It is therefore ordered as follows:

The provisional order is confirmed. The counter- application by the respondents is dismissed with costs.

Dube, Manikai & Hwacha, applicants' legal practitioner
Atherstone & Cook, respondent's legal practitioners