

ZIMBABWE NATIONAL WATER AUTHORITY  
versus  
JUSTEIN MAPANZURE

HIGH COURT OF ZIMBABWE  
MUTEVEDZI J  
HARARE, 15 November 2023

### **Opposed Court application**

*B Mahuni*, for the applicant  
*B Hwachi*, for the respondent

**MUTEVEDZI J:** Often times, the law is not complex at all. It is human beings who seek to complicate its application. For instance it needs no legal training to understand that:

“*Actio rei vindicatio* is based on the principle that an owner cannot be deprived of his property against his will. He is entitled to recover it from any one in possession of it without his consent. He has merely to allege that he is the owner of the property and that it was in the possession of the defendant/respondent at the time of commencement of the action or application.”

The above remarks of ZIYAMBI JA in the case of *Nyahora v CFI Holdings* SC 81/14 typify the rationale behind the remedy of *actio rei vindicatio* and the requirements that an applicant seeking such relief has to meet before it is granted. As will be demonstrated later the rule admits of no discretion on the part of the court no matter how sorrowful the respondent’s situation may appear.

On 12 October 2023, I heard arguments in this matter. From the papers the respondent is in financial dire straits and is struggling to make ends meet. Despite him being in that invidious position, the law was completely not in his favour and on 16 October 2023 I granted the relief which the applicant had sought. It was to the effect that:

1. The respondent be and is hereby ordered to forthwith surrender the applicant's motor vehicles namely:  
(a) An Avant Garde Toyota Hilux Double cab, Engine No. 1GD0575104 Registration No. AF E 2211 Bronze in colour.  
(b) a white Toyota Hilux single cab, Engine No. IKO6109280, Registration No. ABH 2059
2. In case of respondent failing to surrender the said motor vehicles within 48 hours of this order, the Sheriff or/and his lawful deputies be and are hereby directed to seize the said cars from the respondent and deliver them to the applicant.
3. The respondent shall pay the applicant's costs.”

On 27 October 2023, the respondent's counsel wrote to the registrar of this Court requesting my reasons for granting the application. I provide them below.

### **The parties**

The applicant in this case is Zimbabwe National Water Authority (ZINWA), a body corporate established in terms of the Zimbabwe National Water Authority Act [*Chapter 20:25*]. The respondent is Jutstein Mapanzure. He was formerly employed by the applicant. He rose through the applicant's organogram. At the time he lost his job he was its catchment manager.

### **The applicant's case**

The applicant alleged it is the owner of two cars described as an Avant Garde Toyota Hilux double cab, bronze in colour, engine number 1GD0575104 with registration number AFE 21211 and a Toyota Hilux single cab, registration number ABH 2059. I will from henceforth refer to the cars as the Avant Garde and the single cab respectively. The applicant further alleged that in terms of its motor vehicle policy and the employment contract signed by the respondent the applicant was obliged to provide him with motor vehicles as part of his employment benefits. Pursuant to that contract the respondent got the motor vehicles. He took possession of the cars and has been in such possession since 2019. Sometime during their employment relationship, the respondent misconducted himself. The applicant said it then decided to prefer misconduct charges against him. Disciplinary proceedings were initiated but midstream through the process the respondent thought he had seen reason and through his erstwhile legal representatives found it prudent to ditch the confrontation approach. He found it wiser that the employment relationship be terminated mutually. Tragically, the attempt was stillborn. The applicant stopped reporting for duty in April 2022. The abscondment from work led the applicant's Chief Executive Officer, as he was mandated to do, to formally request the respondent to surrender the applicant's cars by not later than 25 November 2022. The respondent did not comply. The applicant send out another request on 29 November 2022 giving the respondent twenty-four hours within which to handover the cars. Once again, the respondent was intransigent. He refused to surrender the cars. Instead on 19 January 2023, through his new legal representatives, Messrs *Nyikadzino and Simango*, the respondent formally advised the applicant that he was resigning from the Authority with effect from 21 January 2023. Through a letter dated 15 February 2023, the applicant acknowledged the notice of resignation. In it ZINWA indicated that the return of the vehicles

was a prerequisite for the payment of the respondent's terminal benefits. Despite those overtures, up to the time this suit was instituted, the respondent had not returned the cars. The applicant further alleged that it is the registered owner of the vehicles in question. It was left with no choice but to approach this court for an order directing the respondent to return to it the motor vehicles in question and that should he fail to do so, the Sheriff of Zimbabwe be authorised to seize the cars and return them to it. In addition it sought costs of the suit on the legal practitioner and client scale.

### **The respondent's opposition**

The respondent sought to controvert the application. He commenced by raising three preliminary objections which I deal with below. For purposes of brevity and clarity, I propose to determine and dispose each allegation as it arises.

### **Non-disclosure and intention to mislead**

The respondent accused the applicant of hiding the following facts from the court:

- a. That the respondent joined the applicant sometime in July 2002 on a fixed term contract of employment. In December the same year he was then appointed as a hydrologist. He added that he resigned from the applicant in 2023 after serving the organisation for twenty years.

The materiality of the facts stated above are difficult to see. An applicant is not expected to state in the founding affidavit every fact that he/she/it knows about the respondent. If that were the expectation, every application would inevitably be copious. As I will later in the judgment return to illustrate, the periods when the respondent joined the applicant and the length of his service both have no bearing on the proof of the applicant's entitlement to the return of the vehicles. They are non-material facts. The same applies to the journey which the respondent travelled in the organisation until he became catchment manager in 2017. The applicant did not hide that at the time their relationship became sour the respondent occupied that position. The respondent went on to raise arguments which support that after five years from the date when the cars were issued to him he should have been entitled to be given the vehicles in question. I viewed such arguments not as preliminary objections but as substantive defences to the *rei vindicatio* claim. They went to the root of the application. I therefore dealt with them as a defence to the merits. I was constrained to dismiss, as I did, this particular objection *in limine*.

### **Material disputes of fact**

The respondent alleged that there was a material dispute of fact relating to the ownership of the vehicles in question. He argued that he was allocated the single cab car in 2009 in line with the applicant's vehicle policy. On that basis, he said the five year period stipulated in the applicant's vehicle policy lapsed in 2016. By virtue of expiration of that period the car belonged to him. He added that when he was appointed catchment manager in 2017 he was allocated the Avant Garde car. It meant all benefits accruing to him including the car were due in 2017. A calculation of the period between 2017 and the time he resigned showed that another five years had lapsed. He once again laid his claim to the vehicle on the effluxion of the five years. He further alleged that the registration book for the Avant Garde car showed that the owner is China International Water and Electric Corporation (Pvt) Ltd and not the applicant. He claimed that there was no explanation of the applicant's ownership of the car.

I entertained no doubt that what the respondent described as a material dispute of fact was in fact not one. His entire claim to the cars stemmed from the applicant's vehicle policy. His point was that the policy required the applicant to hand over the cars to him after the expiration of a period of five years from the date when he was allocated each of the cars. The applicant argued that he was wrong because there was more to it than just the five years. From that I did not see how any material dispute of fact could arise. Whether the vehicles in question belonged to the applicant or to the respondent was an issue which was easily determinable from an examination of the applicant's motor vehicle policy. A material dispute of fact does not arise simply because a respondent alleges there is one. The case of *Supa Plant Investments v Chidavaenzi* 2009(2) ZLR 132(H) at 136 F-G which was cited with approval by the Supreme Court in *Dube v Murehwa and Another* SC 68/21 is apposite in that regard. This court put it in the following terms:

“...it is not the number of times a denial is made or the vehemence with which a denial is made that will create a conflict of fact such as was referred to by ...in *Masukusa v National Foods Ltd and Another* 1983(1) ZLR 232 (H) and in all other cases which have followed. A material dispute of fact arises when such material facts alleged by the applicant are disputed and traversed by the respondent in such a manner as to leave the court with no ready answer to the dispute between the parties in the absence of further evidence.”

As already pointed out, in this case the dispute as to the ownership of the cars could be resolved by reference to and the interpretation of the respondent's contract of employment, the applicant's motor vehicle policy and the vehicles' registration books. If there was any dispute, the court was of the view that the parties' contrasting positions could easily be

reconciled on the papers without causing prejudice to either of them. See the case of *Muzanenhamo v Officer Commanding Police and Others* 2013(2) ZLR 604 which implores judicial officers to adopt an enduring way of looking at and resolving applications regardless of the presence of a conflict of fact.

It was on that basis that I concluded that there was no material dispute of fact incapable of resolution on the papers before the court. The preliminary objection was accordingly dismissed for that reason.

### **That deponent to founding affidavit had no authority to act for applicant**

The respondent alleged under this head, that there was no resolution which showed that it was the applicant which was litigating in this case. As such, he protested that Tawanda Katehwe who deposed to the applicant's founding affidavit was on a frolic of his own. In the applicant's answering affidavit, Tawanda Katehwe insisted that the applicant had given him full authority to institute these proceedings. To that end he then attached a resolution by the applicant's board of directors giving him authority to litigate on behalf of ZINWA. In its heads of argument the applicant referred me to MATHONSI J (as he then was)'s remarks in the case of *Tian Ze Tobacco Company (Pvt) Ltd v Vusumuzi Muntuyedwa* HH 626/15 where his LORDSHIP berated litigants who needlessly wave the authority card to create a defence where none exists. I fully subscribe to and associate myself with the principles stated therein. He put it in the following terms:

“It is now fashionable for respondents who have nothing to say in opposition to question the authority of the deponent of a founding affidavit in order to appear to have a defence. I stand by what I stated in *African Banking Corporation of Zimbabwe Ltd/a Banc ABC v PWC Motors (Pvt) Ltd and Others* HH 123/13 that the production of a company resolution as proof that the deponent has authority is not necessary in every case as each case must be considered on its merits. All the court is required to do is satisfy itself that enough evidence has been placed before it to show that it is indeed the applicant which is litigating and not an unauthorised person.

Indeed where the deponent of an affidavit has said that she has the authority of the company to represent it, there is no reason for the court to disbelieve her unless it is shown evidence to the contrary and where no such evidence is produced, the omission of a company resolution cannot be fatal to the application. That is as it should be because an affidavit is evidence acceptable in court as it is a statement sworn before a commissioner of oaths. Where it states that the deponent has authority, it can only be disbelieved where there exists evidence to the contrary. It is not enough for one to just challenge the existence of authority without more as the respondent has done.”

In this case the deponent categorically stated in the founding affidavit that he had been authorised by the company to litigate on its behalf. In his answering affidavit and in direct response to the challenge of his authority, he supplemented that averment by attaching

a resolution of the applicant's board to that effect. By doing so, he was not introducing new evidence as alleged by the respondent but was simply answering the allegations made against his representation of the applicant. He was entitled to do so. Even more convincing was the fact that the respondent was aware that the applicant had all along been pursuing him for the return of the vehicles. He had been in countless meetings and had undertaken a series of negotiations with the applicant for the mutual termination of his employment contract. For him to turn around and pretend that the applicant had no clue about this litigation or that the deponent of the founding affidavit was acting on his own accord is being disingenuous. With all the evidence pointing in the direction that it was the applicant which instituted the proceedings, the respondent was required by law to show the court proof that it was not. He did not do that. What remained was his bald allegation that the deponent of the affidavit had no authority. Such a bare denial cannot be adequate to support his bid to impugn the application. It had to, as it did, obviously fail.

#### **The issue for determination**

Having disposed of the preliminary objections, the only issue which stood out for determination in this case was whether or not the applicant was the owner of the vehicles. If it was, the ancillary question was whether the respondent had authority to possess the cars.

#### **The law**

I restate what I pointed out at the beginning of this judgment. The *actio rei vindicatio* is an action instituted by an owner of property to reclaim that property from any individual who retains possession of it without the owner's authority. It stems from the concept that an owner cannot be deprived of his property without his consent. See the case of *Tendai Savanhu v Hwange Colliery Company* SC 8/15. Other authorities such as *Alspite Investments (Pvt) Ltd v Westerhoff and Others* 2009(2) ZLR 226 (H) have even extended the concept and said that:

“... so exclusive is the right of an owner to protect his property that he is entitled to recover it wherever is found, without alleging anything further than that he is the owner of the property and that the defendant is in possession of the property. The *actio rei vindictio* is an action enforceable against the world at large. It is a rule or principle of law that admits of no discretion on the part of a court.”

I must add that for a respondent to successfully fend off a suit of *actio rei vindicatio* he/she/it must demonstrate that he/she/it is entitled to retain the property on the basis of some right which is enforceable against the owner. In other words once the owner makes the necessary allegations as pointed out earlier, the burden shifts to the respondent to show that

he/she/it has some lawful right to hold on to the property. See the case of *ZIMASCO (Pvt) Ltd v Farai Maynard Marikano* HH 235/11.

### **Application of the law to the facts**

The respondent left the applicant's employ on 20 January 2023. He grounded his argument to retain the cars on his contract of employment and the applicant's motor vehicle policy. The respondent's contract of employment is silent in relation to the purchase of his conditions of service vehicles. It simply states in clause 6. v. that:

#### **v. Provision of Company Car**

You will continue to use the vehicles you are currently using until a new Toyota twin cab 4x4 is provided in terms of the Authority's vehicle policy.

As is clear, there is nothing in that clause which enfranchises the respondent to the vehicles. If anything it makes reference to the applicant's motor vehicle policy. A copy of that policy was availed to the court. It speaks to replacement of vehicles in clause 5.6 thereof which provides that:

5.6.1. Vehicles may be replaced at the end of 5 years from the date of purchase.

5.6.2. Current users of the vehicles may be given the option to purchase the vehicle at the average price of the market value and the net book value as approved by the Chief Executive officer in the case of other staff and the Board in the case of the Chief executive Officer.

The above provision relates to serving employees. But further in the policy the situation which befell the respondent is equally catered for. Clause 5.7 provides for termination of employment in the following material terms:

#### **5.7. TERMINATION OF EMPLOYMENT**

5.7.1. In the event of an incumbent leaving the Authority, for whatever reason, resignation, retrenchment, retirement, dismissal or death **the use of the Authority vehicle shall immediately cease.**

The respondent resigned from the Authority. His case is therefore more particularly governed by clause 5.7.2 (a) which states that:

##### **a) Resignation**

If a manager resigns **amicably** from the Authority after serving for ten (10) years and above, the following options **may** be considered

- i. The Authority **may** consider selling the vehicle to the holder if the vehicle has been used for more than two years but less than 5 years from the date of purchase at the average price of the Net Book Value and the Market Value (Bolding is mine for emphasis)

What stands out from the above provisions of the applicant's motor vehicle policy is that where a manager leaves the employ of the Authority for whatever reason his/her entitlement to the use of the Authority's vehicles ceases from the time he/she leaves employment. The rule applies indiscriminately. The manner of termination of a manager's employment seems not to matter. More specific conditions then apply depending upon how one would have left employment. We were in this case solely concerned with conditions which applied to termination by resignation because there is no argument that the respondent resigned from service. A number of issues are evident from clause 5.7.2. (a) as shown above. The first one is that the manager must have resigned amicably. It is debatable in this case whether or not the respondent resigned amicably. The word amicably means 'friendly and peaceable.' The indisputable evidence before the court was that the respondent was charged with misconduct. He chose to resign when disciplinary action had already commenced. Given that acrimony it is difficult to say that the resignation was amicable. The court was however prepared to give the respondent the benefit of doubt and accept that for the purposes of this application, he had resigned amicably. That still did not entitle him to the vehicles as of right. The policy states that the Authority may consider selling the vehicle to the holder. It does not say that the vehicle shall be sold to the holder. Needless to point out the clause reposes in the Authority the discretion to sell or not to sell the car to a manager who has resigned. In the case of *Tendai Savanhu v Hwange Colliery Company* SC 8/15 the Supreme Court cited with approval the case of *Dhege v Dell Medical Centre* HB 50/04 in which a similar situation had arisen. It was held that:

"In the circumstances it cannot be argued that the respondent...was obliged to sell the company car to the applicant. The court cannot compel a party to exercise its discretion in a particular fashion. The court can only 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."

In instances where a company's vehicle policy is drawn in terms like the applicant's the disposal of the motor vehicles to employees is entirely the discretion of the company. The same applies to the respondent's argument that the cars should have been sold to him at the time he was still in the employ of the Authority. For that, his situation would be regulated by clause 5.6.2. That provision equally shows that the Authority retained the discretionary power to sell or not to sell the car to the concerned employee. The respondent's argument that the



single cab car was allocated to him in 2009 and became his after his promotion to the position of water supplies manager is not supported by any evidence. He was required to produce the Authority's offer to him to purchase the vehicle. He was equally expected to produce his acceptance to purchase the car, the purchase price at which he was offered and the receipts showing that he duly paid for it. As long as the Authority did not offer him the opportunity to purchase the car, it remained the property of the Authority regardless of the number of years he spend using it. He further alleged in para 21 of his opposing affidavit that after his resignation from the Authority his life turned for the worse and he struggled to make ends meet particularly because the applicant delayed in paying out his terminal benefits. He chose to dispose of the applicant's Avant Garde vehicle. Yet in the papers the applicant said it had indicated to him that the payment of his terminal benefits was dependent upon his return of the Authority's vehicles. His complaints about the non-payment of his benefits by the applicant were not a defence to the claim he faced. Instead they are a purely labour dispute for which he must approach the Labour Court for redress. The applicant's vindicatory claim cannot fail on the lame excuse by the respondent that he deliberately disposed the vehicle so it is no longer there and is no longer identifiable. Author R.S. Christie in his work *Business Law in Zimbabwe*, 2<sup>nd</sup> Edition, Juta & Co Ltd at pp 149-150 makes the point that:

“An owner whose property has been sold and delivered without his consent remains the owner, as the seller cannot pass ownership that was not his. The true owner can bring a vindicatory action to recover his property from anyone, including a *bona fide* buyer, in whose hands he finds it. The general rule that the seller can give no better title than he has operates in favour of the true owner, unless the purchaser proves that the true owner is estopped from denying the seller's authority to sell.”

In the court's eyes the vehicle in question remains in the respondent's possession and the applicant is entitled to its return.

I also found the argument by the respondent that the Avant Garde car belonged to China Water International not worth of serious consideration. The respondent was never employed by China Water International. He had no relationship with that entity. It was the applicant which was related to that corporation. The applicant not only fully explained how the car came to be registered in the name of China Water International but also procured a supporting affidavit from that company vouching for the averments made in relation to the ownership of the car. In any case, vehicle registration books expressly state that the registration book is not proof of legal ownership of a car. That the applicant's telephone numbers may have appeared on some of the documents would not make any difference. He

was a senior employee of the applicant and it would not be out of this world that he could have been involved in the contract negotiations between the applicant and China Water International. As stated earlier the negotiations for the mutual termination of the contract of employment were abortive. Once that happened the relationship between the parties reverted to be regulated by the existent contract and the applicant's motor vehicle policy. Anything outside that amounted to wishful thinking. Granted the respondent has an arguable labour case if he surmounts the hurdle that his resignation was not amicable but that has nothing to do with this court. He must take his issues to the appropriate fora.

### **Disposition**

The applicant proved its ownership of the two vehicles in question. It established that they were both in the possession of the respondent. In turn the respondent's alleged right to retain the cars was premised on a flawed interpretation of the applicant's motor vehicle policy. That policy accorded him a privilege and not a right to purchase the company cars. The privilege was only exercisable if and when the applicant decided to offer the cars for sale. In the respondent's case, the applicant chose not to. The court could not force it to do so. The application could only succeed.

### **Costs**

The rule is that costs generally follow the cause. I did not find anything extraordinary for me to depart from that approach.

It was forth above reasons that I granted the order which the applicant had prayed for as already indicated.

*Mvinga & Mugadza*, applicant's legal practitioners  
*Nyikadzino, Simango & Associates*, respondent's legal practitioners