ZIMBABWE NATIONAL ROAD ADMINISTRATION
versus
GIFT KANOTANGUDZA

HIGH COURT OF ZIMBABWE
CHINAMORA J
HARARE, 29 June 2020 & 3 February 2023

Opposed Application

M Mandevere, for the applicant
H Mukonoweshuro, for the first respondent

CHINAMORA J:

Introduction

Before me is an application by the Zimbabwe National Road Administration (ZINARA) for *rei vindication* in respect of a Toyota Hilux (double cab) motor vehicle, registration number AEC 7539 ("the vehicle"). The application is opposed. The factual background giving rise to the dispute is that in May 2010, the applicant and the respondent entered into a contract of employment. The respondent was employed as IT Manager of the applicant. The contract appears in the record on pages 8-10 marked Annexure "B". Clause 6(b) of this contract reads as follows:

> "*Vehicle benefit*- The IT Manager shall be entitled to conditions of service, 4 x 4 model with engine capacity up to 3.0 litres with fuel for private mileage of 200 litres per month. And also shall be entitled to purchase his conditions of service vehicle at a residual value of 10% of the cost price at the end of four years".

On 16 September 2016, applicant availed the vehicle to the respondent for use during the course his employment. Then on 9 July 2019, the respondent resigned from his employment. The resignation letter is Annexure "E" on p 13 of the record. In terms of clause 6(b), the respondent could purchase the vehicle after 4 years at 10% residue value. However, when he resigned, the respondent had not reached 4 years in employment, and the vehicle had not been offered to him by the applicant. The respondent did not surrender the vehicle when he resigned. The applicant

asserts that it is the owner of the vehicle, and that respondent is holding on to it without its consent or just cause from the time of resignation.

On 6 November 2019, the applicant (through its lawyers) demanded the return of the vehicle, but the respondent failed to do so. The letter of demand is marked Annexure "F", and is in record on pp 14-15. The failure to heed the request to return the vehicle prompted the applicant to file this application seeking the return of the vehicle and costs of suit.

In response, the respondent denied that vehicle belonged to the applicant. Instead, he averred that by the time he resigned he had exercised his right to buy the vehicle. He argued that, clause 6(b) of the contract of employment gave him the right to purchase the vehicle. Further to this, he denied that the vehicle had to reach 4 years and that it had to be offered to him first. The respondent stated that he bought his first conditions of service vehicle in May 2014. He asserted that he was entitled the conditions of service vehicle every 4 years thereafter.

The respondent submitted that he joined the applicant on 5 May 2015 and resigned in July 2019, meaning that he had worked for the applicant for a continuous period of 9 years. He added that as he had worked from 2010 to 2019, he had completed 2 four year periods in the employment of the applicant. At the end of the first 4 years, the respondent said that he purchased his conditions of service vehicle in 2014. Therefore, he contended that he was entitled to buy another conditions of service vehicle in 2018. In addition, the respondent alleges that he verbally asked the applicant to give him the vehicle's price so that he could pay for it, but only got excuses. He then demonstrated this right by providing an extract from a contract of employment between the applicant and another employee in middle management, whose contract had a differently worded vehicle benefits clause. That clause require the price to be approved by the board of directors or for ZINARA to first deem it fit to replace the vehicle.

According to the respondent, ZINARA should contractually have issued him with another vehicle in 2014, but it was only given to him in September 2016. Yet the applicant continued to treat the respondent as if the vehicle had been issued to him, because the applicant deducted vehicle tax benefit from June 2014 to September 2016. To confirm his assertion, the respondent provided the court with his pay slips for May 2015, February 2016, March 2016, May 2016, June 2016 and July 2016. Because of this, the respondent contends that the applicant is estopped from relying on the defence that the vehicle had not reached, that he was entitle to keep the vehicle. I

will now examine the law relevant to the issue in *casu*, in order to determine whether or not the respondent has a right of retention over the vehicle.

The applicable law

The law relating to *actio rei vindicatio* is settled in this jurisdiction. In South Africa, the law is the same. It is an action derived from the principle that an owner of property to recover it from any person who retains possession of it without his consent or other lawful basis. The position was set out in *Nyahora* v *CFI Holdings* SC 81-14 by ZIYAMBI JA who succinctly stated:

> "The action *rei vindicatio* is available to an owner of property who seeks to recover it from a person in possession of it without his consent. It 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. If he alleges any lawful possession at some earlier date by the defendant then he must also allege that the contract has come to an end. The claim can be defeated by a defendant who pleads a right of retention or some contractual right to retain the property." **[My own emphasis]**

In *Chetty* v *Naidoo* 1974 3 SA 13 (A), which is the *locus classicus*, the law was stated as follows:

> "It is inherent in the nature of ownership that possession of the *res* should normally be with the owner, and it follows that no other person may withhold it from the owner unless he is vested with some right enforceable against the owner (e.g., a right of retention or a contractual right).
>
> The owner, in instituting a *rei vindicatio*, need, therefore, do no more than allege and prove that he is the owner and that the defendant is holding the *res* - the onus being on the defendant to allege and establish any right to continue to hold against the owner… (cf. *Jeena* v *Minister of Lands* 1955 (2) SA 380 (AD) at pp 382E, 383)…"

From the case law, it is trite that for one to succeed in an *actio rei vindicatio*, they must prove that ownership of the property which they seek to vindicate, and establish that the person in possession holds it without their consent or any lawful cause. Conversely, to successfully defend the claim, the possessor must show a right to retain the property or a contractual basis to hold onto the property. Let me proceed to apply the law to the facts of this case.

Analysis of the case

In *casu*, it is common cause that the respondent in possession of the applicant's vehicle. The respondent claims a right to retain possession of the vehicle after resigning from ZINARA. He relies on clause 6(b) of the employment contract which allows employees (on termination of

their employment) to purchase vehicles issued for their use during their employment. Additionally, the respondent's contention that the applicant, by continuing to deduct the vehicle tax benefit from his salary, is estopped from raising the defence that the respondent had not had the vehicle for 4 years as contemplated by clause 6(b) of the employment contract. The parties are in agreement that the right that each of them seeks to protect emanate from clause 6(b) of the contract of employment, but differ on its interpretation. The question that calls for an answer is whether clause 6(b) of the contract creates a right of retention for the respondent. Such an inquiry is imperative (if not, unavoidable, because the documents before the court show that the vehicle is in the applicant's name. The registration book appears on p 12 of the record marked Annexure "D". Also on record is the employment contract (Annexure "B") which incorporates clause 6(b).

It is important, in the circumstances of this case, to determine if the contract indeed gives the respondent a right to retain the vehicle or whether this derives from the doctrine of estoppel or both Let me begin with what, perhaps, may appear to be elementary. My understanding of the ordinary meaning of clause 6(b) is that:

i. The respondent (as IT Manager) shall be entitled to the vehicle described in the contract as part of his conditions of service.
ii. at the end of 4 years the respondent was entitled to purchase the said vehicle at a residual value of 10% of the cost price.

It is obvious from this interpretation of clause 6(b) and conduct of the applicant in deducting the vehicle tax benefit from the respondent's salary, that during his employment tenure, the respondent was entitled to a conditions of service vehicle. My view is that any delay in providing the vehicle to the respondent did not affect the vehicle benefit, as he was well cushioned by the vehicle tax benefit at a time when the respondent did not enjoy the benefit. Ordinarily, an employee whose contract has been terminated has no right of retention over the employer's property derived from employment. (See *William Bain and Co Holdings (Pvt) Ltd* v *Nyamukunda* HH 309-13 and *Forestry Commission* v *Betty Muwonde* HH 9-18). However, the respondent's circumstances are clearly distinguishable. In the *Forestry Commission case*, the right sought to be relied on spoke to occupation during the period of employment. On the contrary, the respondent's right of retention is based on the entitlement to purchase the vehicle

vested in clause 6(b) of the contract. This right, in my view, accrued to the respondent in 2014, otherwise no plausible basis exists for the applicant to deduct vehicle tax benefit well knowing that it had not given the respondent a conditions of service vehicle. I am satisfied from the evidence before me that the respondent has, on a balance of probabilities, established a right of retention of the vehicle based on clause 6(b) of the contract of employment and the conduct of the parties. In this respect, the deduction of vehicle tax benefit from June 2014 to September 2016 (which was not denied by the applicant) seems to me to be a tacit acceptance by the applicant that the period of eligibility to purchase the conditions of service date would be calculated from that date. Any other interpretation would be absurd. I am inclined to dismiss the application, and must consider the issue of costs.

The general rule is that costs follow the result, and I find no reason for departing from that approach. While the respondent has asked for costs on the attorney and client scale, in exercise of my discretion, I will award costs on the ordinary scale. Even though the applicant has not succeeded in its claim, I do not believe that it has litigated in bad faith or with a desire to abuse the court process. Both parties presented plausible arguments before the court, and it would be unfair to say that the applicant's case was driven by *mala fides*. As such, I agree with the CHITAPI J's remarks in *Netone Cellular (Pvt) Ltd* v *Reward Kangai* HH 441-19, that a party should not be penalized with punitive costs for holding a contrary legal view, since opposing arguments on the law enhance our jurisprudence. In my view, an award costs on the higher scale would not be justified.

Disposition

In the result, I grant the following order:

1. The application be and is hereby dismissed.
2. The applicant shall pay the respondent's costs on the ordinary scale.

Kadzere Hungwe & Mandevere, applicant's legal practitioners

H Mukonoweshuro & Partners, respondent's legal practitioners