

NATIONAL PHARMACEUTICAL COMPANY OF ZIMBABWE
versus
ZEALOUS NYABADZA

HIGH COURT OF ZIMBABWE
MUSITHU J
HARARE: 14 February 2023 & 12 February 2024

Opposed Application- *Rei Vindicatio*

Mr *O Kondongwe*, for the applicant
Mr *S T Mutema*, for the respondent

MUSITHU J:

The applicant approached this court for a *rei vindicatio* to recover a motor vehicle that was issued to the respondent as part of his conditions of employment with the applicant. The respondent's contract of employment was terminated on 31 August 2020, and he was requested to surrender the vehicle. The respondent did not surrender the vehicle despite the request. The respondent's conduct prompted the applicant to approach this court for the following relief:

"IT IS HEREBY ORDERED THAT:

1. The Application for *rei vindicatio* be and is hereby granted.
2. The respondent be and is hereby ordered to surrender the Toyota Hilux motor vehicle registration number AEK 1508 to the applicant's offices within forty-eight (48) hours of this order.
3. In the event that respondent fails to comply with the order in (2) above, the Deputy Sheriff be and is hereby empowered to seize from the respondent and deliver to the applicant the Toyota Hilux motor vehicle registration number AEK 1508 without notice.
4. The Respondent to pay costs of suit on an ordinary scale."

The application was opposed.

The Applicant's Case

The applicant and the respondent entered a three-year fixed term contract of employment on 1 September 2017. It was set to expire on 31 August 2020. One of the conditions of the contract was that the applicant would provide the respondent with a motor vehicle which would be surrendered on the expiry of the contract. On 6 January 2020, the applicant sent the respondent a written notification reminding him that his contract was due to

expire on 31 August 2020. The respondent was obliged to surrender the applicant's assets on the said date. The contract of employment was indeed terminated on 31 August 2020, and the respondent was requested to surrender the vehicle. The respondent did not comply with the request.

According to the applicant, what underlies its claim is the principle that an owner must not be deprived of his property without their consent. The applicant owned the vehicle, a Toyota Hilux registration number AEK 1508, which was allocated to the respondent on 6 June 2017, as part of his conditions of employment. The applicant submitted that in terms of clause 6.3 of its Transport Policy, vehicles that were allocated to management and were not yet due for disposal had to be surrendered to the applicant on termination of employment. A vehicle was only due for disposal if it was used by the manager for a period exceeding 3 years.

The respondent's right to possess the vehicle ceased upon the termination of his contract of employment. He was therefore in unlawful possession of the said vehicle. All efforts to regain possession of the vehicle had been in vain.

The Respondent's Case

The opposing affidavit raised three preliminary points. The first was that the deponent to the applicant's founding affidavit had no *locus standi* to act on behalf of the applicant. Nothing had been placed before the court to show that the deponent had authority to represent the applicant. The second point was that the applicant had no right to institute the present proceedings since the question of the ownership of the vehicle was presently *lis pendens*. The respondent claimed to have instituted a claim for unlawful termination of his contract of employment as well as for payment of his terminal benefits. The claim was yet to be resolved. The third point was that the application was fatally defective for want of compliance with r 59(1) of the High Court Rules, 2021(the Rules). The application was not in form 23.A of the Rules. It was in form 29 of the old High Court Rules, 1971 (the old Rules).

Concerning the merits, the respondent claimed that he was employed by the applicant as Information and Technology Manager from 1 September 2005. He had been in the applicant's employ for 15 years as the short-term employment contracts got renewed before their expiry. The respondent claimed to have had five contracts with the last one tacitly relocating to the sixth.

According to the respondent, his contract was indeed supposed to lapse on 31 August 2020, but it did not. The contractual relationship continued until its termination on 6 January 2021. In addition to his contractual obligations, at one point he was employed as the Operations Manager as well as the Acting Managing Director. On the expiry of the additional short-term contracts as Operations Manager and Managing Director respectively, he continued with his position as Information Technology Manager, even after 31 August 2020.

The respondent denied that the fixed term contract required him to surrender the vehicle upon its termination. Para 4.1 of the contract stipulated that the use and disposal of the vehicle was subject to the Board of Director's approved vehicle policy. That policy stated that a manager who had been allocated a vehicle was entitled to purchase the vehicle provided he had served for five years. The applicant claimed that in 2010, he got his first vehicle, a Mazda 626 Reg. Number AAN 9989. In 2015 he got his second vehicle a Mazda BT 50 Reg. Number ACM 1969. The applicant averred that his five-year contractual term for purposes of entitlement to the disposal of the current vehicle commenced on 1 September 2015 through to 31 August 2017. This contract was then renewed on 1 September 2017 and was set to lapse on 31 August 2020.

The respondent contends that the period which entitled him to own the vehicle commenced on 1 September 2015 to 31 August 2020. His contract was supposed to terminate on 31 August 2020, but as had become the trend, it relocated and continued beyond that date. The contract was then supposed to terminate on 31 August 2023. Be that as it may, the vehicle had become due to him on 31 August 2020.

The respondent averred that the applicant erred in referring to the 6th of January 2020 as the date on which he was given notice of termination of employment. The correct date was 6 January 2021, being the date on which the letter was stamped and served. That notice of termination was therefore served some 4 months after the date on which the contract ought to have expired. For that reason, the respondent argued that by the time the notice of termination was given, the contract of employment had already relocated, and the new contract was at least four months old.

The respondent also contends that the request to surrender the applicant's assets occurred during the subsistence of the sixth contract. That explained why the notice of termination did not specify that the vehicle ought to be returned as it was already his. The

respondent also dismissed the attached transport policy as a doctored version. He attached his own copy which he claimed to be the correct version.

The respondent disputed the applicant's claim that it was the owner of the vehicle, and that he was in unlawful possession of same. Instead, the only evidence placed before the court only showed that the vehicle was allocated to the respondent. The respondent denied that it was the applicant's policy that a vehicle should be surrendered if a manager had not used it for more than three years. The respondent averred that there were two options. The first was that if a manager served for a period of more than five years, he automatically qualified to be allocated the vehicle. This was the basis upon which the respondent claims to have received the first two vehicles. The second option was that the vehicle must have been at least three years old, and not that the vehicle must have been allocated to the manager for at least three years for one to qualify to receive it as his own. The respondent further averred that the applicant's allegation was that the vehicle must be returned on dismissal, yet in its notice of response to his claim, the same applicant had claimed that he was not dismissed.

The respondent further argued that the applicant's policy permitted him to retain the vehicle. Since 2021, the applicant had not made a claim for him to surrender the vehicle and therefore it came as a complete surprise why the claim was being made now. The respondent also alleged to have claimed ownership of the vehicle before a Labour Officer, and that claim was pending. In its response to that claim, the applicant had not made any reference to the vehicle. That claim would be determined by the Labour Court which was a court of competent jurisdiction to entertain such claims. It was therefore improper for the applicant to approach this court for a *rei vindicatio* when the question of the ownership of the vehicle was pending before the Labour Court.

The Applicant's Reply

In its response to the opposing affidavit, the applicant attached to its answering affidavit a copy of its Board Resolution ratifying the applicant's act of signing the founding affidavit on its behalf, as well as authorising him to represent it in this matter. As regards the second preliminary point of *lis pendens*, it was submitted that the matter before the labour officer was concerned with the alleged unfair termination of employment and was therefore distinguishable from the present matter. It was also averred that at any rate the labour office was not a court of competent jurisdiction to sustain the defence of *lis pendens*. In respect of

the third point, it was averred that the application was made in terms of the correct forms and the error alluded to by the respondent was immaterial.

The applicant insisted that the respondent was on short term contracts which would self-terminate. The last contract commenced on 1 September 2017 and was terminated on 6 January 2021. The applicant also insisted that the issue of motor vehicles was governed by clause 6.3 of the applicant's Transport Policy, and a manager became an owner of a vehicle upon fulfilling the conditions set out in clause 6.3. In other words, the concerned employee had to purchase the vehicle. The respondent had not made an offer to purchase the vehicle.

The applicant also averred that an offer was conditional upon an acceptance for it to create a contract. A mere offer did not confer upon the respondent the right to remain in possession of the motor vehicle following the employer's demand to have the vehicle surrendered. The respondent therefore had no legal right to continue holding on to the vehicle following the termination of his contract. Even if he had a right to purchase the vehicle, such right could not be used as a defence to a claim for a *rei vindicatio*.

The submissions and analysis of the preliminary points

Authority to institute proceedings on behalf of the applicant

Mr *Mutema* for the applicant submitted that the deponent to the applicant's founding affidavit did not have the authority to institute proceedings on behalf of the applicant making the application irregular. He further submitted that even the attempt by the applicant's board to ratify the deponent's actions was irregular. Counsel further submitted that the deponent's act of deposing to the founding affidavit on 29 March 2022, without the necessary resolution was tantamount to a fraudulent misrepresentation. A fraudulent act could not be subsequently ratified at law. The resolution was a concession that as at the date of the deposition, the deponent was not authorised to act on behalf of the applicant. The application was therefore fatally defective and ought to be dismissed with costs on the higher scale.

In response, Mr *Kondongwe* for the applicant submitted that it was not necessary for a party to always attach a resolution of the Board unless the authority to institute proceedings was challenged. He cited the case of *Dube v Premier Service Medical Aid Society & Another*¹ to support this proposition. Counsel further submitted that a resolution could always be furnished after the filing of a founding affidavit, if one was needed. Mr *Kondongwe* further

¹ SC 73/19

submitted that in any case, the applicant had subsequently ratified the signing of the founding affidavit on its behalf.

The applicant's founding affidavit was deposed to by Tichaona Nyovhi on 29 March 2022. The deponent signed the affidavit in his capacity as the Acting Company Secretary of the applicant. In the affidavit, the deponent states that, "*I am duly authorised to depose to this affidavit on behalf of the Applicant.*" The application was issued and filed on 6 April 2022. The applicant's Board Resolution attached to the answering affidavit is dated 14 September 2022. Counsel for the respondent argued that the resolution all but confirmed that at the time the deponent signed the founding affidavit he did not have the authority to institute proceedings on behalf of the applicant. He therefore made a fraudulent misrepresentation which could not be subsequently ratified.

In the *Dube v Premier Service Medical Aid Society & Another*² the court made the following pertinent observations.

"[38] A person who represents a legal entity, when challenged, must show that he is duly authorised to represent the entity. His mere claim that by virtue of the position he holds in such an entity he is duly authorised to represent the entity is not sufficient. He must produce a resolution of the board of that entity which confirms that the board is indeed aware of the proceedings and that it has given such a person the authority to act in the stead of the entity. I stress that the need to produce such proof is necessary only in those cases where the authority of the deponent is put in issue. This represents the current state of the law in this country." (Underlining for emphasis)

What emerges from the above authority is that the need to provide the relevant proof that one is authorised to represent an entity arises where the authority of the deponent has been challenged. It must also be remembered that the party that instituted the proceedings herein is the applicant. The deponent is not a party to these proceedings. He only spoke on behalf of the applicant in making that deposition. It is the applicant that can certify whether the deponent was indeed authorised to act on its behalf when he signed that affidavit on its behalf.

In the said Board resolution, the applicant not only ratified the deponent's act of signing its founding affidavit on 29 March 2022. It also authorised him to represent it as well as sign all relevant documents in this matter. In ratifying the deponent's acts, the applicant all but confirmed that at the time that the deponent signed the founding affidavit on its behalf, he was authorised to act on its behalf. I find the respondent's submission that the deponent committed a fraudulent misrepresentation rather ill-conceived and farfetched. The only party

² *Supra*

that could confirm whether the deponent had authority to act in the manner he did was the applicant itself. The respondent did not challenge the authenticity of that resolution. The preliminary point is accordingly dismissed for lack of merit.

Whether the matter is *lis pendens*

Mr *Mutema* submitted that the applicant's claim was premised on its ownership rights of the vehicle. In the heads of argument, the respondent claimed that the Labour Officer before whom the matter was initially placed was authorised to deal with the question of ownership by virtue of s 93(5)(c) of the Labour Act [*Chapter 28:01*]. In the same heads of argument, the respondent claimed that the dispute about the ownership of the vehicle was pending before the Labour Court. The plea of *lis pendens* could therefore be competently raised because the same issue being raised herein was pending before another court of competent jurisdiction.

In his response, Mr *Kondongwe* submitted that the preliminary point was improperly taken. This was because in his notice of opposition, the respondent indicated that he had instituted a claim for unlawful termination of his employment contract as well as payment of terminal benefits which included the vehicle.

The plea of *lis pendens* was dealt with by MAKONESE J in *Mabhena v PG Industries [Zimbabwe] Limited & 3 Ors*³, as follows:

“The defence of *lis alibi pendens* is based on the proposition that where a dispute between the parties is being litigated elsewhere, it is inappropriate for it to be litigated in the court or tribunal in which the plea is raised.

The position on the law is set out in, *The Civil Practice of the Supreme Court of South Africa*, 4th Edition, by the authors, Van Winsen, at page 249 as follows:

“If an action is already pending between parties and the plaintiff brings another action against the same defendant on the same cause of action and in respect of the same subject matter, whether in the same or in a different court, it is open to the defendant to take the objection of *lis pendens*, that is, that another action respecting the identical subject matter has already been instituted, whereupon the court in its discretion may stay the second action pending the decision of the first.....

A defence of *lis pendens* depends upon the existence of pending earlier action.”

A party can only successfully invoke the plea of *lis pendens* if they can demonstrate that the claim that has been instituted before the court for determination is already pending before another forum of competent jurisdiction, involving the same parties. It would be inappropriate for the court to entertain an identical dispute involving the same parties before the earlier dispute is resolved.

³ HB 156/15 at p 3

The respondent's papers do not give a complete story herein, making it difficult for the court to determine what dispute is pending and where exactly it is pending. In para 5 of his opposing affidavit, the respondent claims to have instituted proceedings "*for unfair termination and a claim for payment of terminal benefit in terms of which I have claimed the same vehicle as mine on the basis of my contract. The claim has been duly instituted before a competent authority. See the relevant portion of my statement of claim marked annexure "A".*"

The said annexure 'A' is just an unlabelled document. It is not dated. It is not clear whether it was part of submissions made in support of some claim, since it does not have a heading. It contains a summary of benefits that the respondent was presumably entitled to. That summary lists fuel allowances, motor vehicle purchase, medical aid, educational assistance, covid allowance and a laptop allowance. In short, that document is meaningless and of no material value.

It is in the heads of argument that the respondent attempts some explanation on the status of that matter. In para 7 of the heads of argument he states:

"For the record, it is now common cause that the matter in respect of which the plea of *lis pendens* is relied upon is before the labour court not before the Labour officer."

In paragraph 8 of the heads of argument, the respondent asserts that:

"The argument that the labour officer before whom the matter was initially placed is not a court has no merit. The plea recognises the right to determine a matter vested in that authority or court. If the respondent's argument was that the labour officer had no authority/jurisdiction to deal with the claim then it would have been arguable regarding the submission as to whether the matter is before another fora.
However, for the avoidance of doubt it is submitted that the labour officer is authorised to deal with the claim of ownership in terms of section 93(5)(c) of the Labour Act [Chapter 28:01]" (Underlining for emphasis)

In one breath, the respondent advances the argument that the matter concerning the ownership of the vehicle is pending before the Labour Court. In the next breath he seems to be advancing the argument that a labour officer is vested with authority to deal with claims of ownership, and for that reason the defence of *lis pendens* was properly taken. But more significantly, nothing was placed before the court to confirm that the matter is indeed pending before a labour officer or the Labour Court. He who avers must prove. In the absence of the relevant proof, I find the preliminary point devoid of merit and I accordingly dismiss it.

Whether the application is defective for want of compliance with the rules

The respondent's argument was that the application was defective because the applicant used a repealed form. The applicant used form number 29, which invited the respondent to file a notice of opposition in terms of form number 29A. The current rules require a court application to be in form number 23. That form invites a respondent to file a notice of opposition in form number 24. In response, counsel for the applicant admitted that indeed a wrong form was used but argued that the error was not fatal in the absence of prejudice to the respondent.

I agree with the applicant's counsel that the use of a wrong form in this case does not render the application fatal. The same old form used herein called upon the respondent to file a notice of opposition within ten (10) days after the date on which the application was served. That is the same requirement under the new rules. Courts are generally chary about elevating form over substance and determining matters based on technicalities. In the case of *Trans Africa Insurance Co Ltd v Maluleka*⁴, SCHREIVER JA said of technical objections:

“Technical objections to less than perfect procedural steps should not be permitted, in the absence of prejudice, to interfere with the expeditious, and if possible inexpensive decision of cases on their real merits.”

These preliminary objections must not be raised as a ritual. It has become a practice amongst practitioners that an opposing affidavit must always be accompanied by preliminary objections, even in the face of numerous case authorities that suggest that the courts are circumspect about disposing of matters on the basis of preliminary points unless a party can point to some prejudice which cannot be cured by an order of costs or a postponement of the matter. I find no merit in the preliminary objection, and it is hereby dismissed.

The Merits

As regards the merits of the application, Mr *Kondongwe* submitted that the weight of case law authority from superior courts that dealt with similar disputes favoured the applicant's position herein. Counsel referred to the cases of *Nyahora v CFI Holdings Private Limited*⁵ and *National Pharmaceutical Company (Pvt) Ltd v Nhau*⁶, whose circumstances are almost on all fours with the present matter. Counsel argued that the respondent had not demonstrated that he had a right of retention. Although he had a right to acquire the vehicle, he could not force the applicant to sell that vehicle to him.

⁴ 1956 (2) SA 273 AD at 278

⁵ SC 81/14

⁶ HH 176/22

In response Mr *Mutema* argued that the respondent's right to acquire the vehicle was created by the contract of employment between the parties. There was no need to create another contract to acknowledge that right. Counsel further submitted that the present case was distinguishable from the *National Pharmaceutical Company (Pvt) Ltd v Nhau* case because in that case the respondent was not disputing the question of ownership. Counsel further submitted that in the present matter the respondent was disputing the applicant's ownership claims.

The Analysis of the merits

The position of the law is that the *actio rei vindicatio* remedy is available to an employer who seeks to recover assets that remain in the possession of an employee whose employment contract has been terminated. The ex-employee must be in possession of such assets without the former employer's consent. Such claim can only be defeated by an ex-employee who asserts some legal right to retain possession. In the *Nyahora v CFI Holdings* case, the court said the following about the rights of the parties:

"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.

In the present case, the respondent raised a claim of right. It was based on the company's motor vehicle policy scheme for its employees clause 5.2 of which provides:
"The vehicle will be replaced on completion of four years of purchase."⁷

Further down the same judgment, the court observed that:

"It is common cause that in 2011, the vehicle had reached "completion of four years of purchase" and that the appellant was dismissed in 2012. However, by the time of his dismissal, the respondent had neither made a decision to dispose of the vehicle nor offered the vehicle for sale to the appellant. The ownership of the vehicle, therefore, remained vested in the respondent. Upon his dismissal, which was not suspended by the appeal noted against it⁸, the appellant ceased to be an employee of the respondent and any former right acquired, by virtue of his employment, to possession of the vehicle for his use, also ceased."

⁷ At pages 7-8 of the judgment

⁸ Labour Act [*Chapter 28:01*] s92E (2)

It is common cause that the respondent claims an entitlement to possession of the vehicle based on his contract of employment and the applicant's transport policy. Clause 6.3 of the Transport Policy provides as follows:

"6.3 Allocated Vehicles

- The manager who had been allocated the vehicle shall be entitled to purchase the vehicle provided the manager has served 5 years.
- The disposal price of a vehicle being sold to a Manager who had served for 5 years shall be 5% of the original purchase price.
- A person leaving after completion of their three year contract, may, at the discretion of the Board, be allowed to purchase the allocated vehicle at a price to be determined by the Board.
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- Allocated vehicles to management which are not due for disposal (less than 3 years) shall be surrendered to NatPharm upon death, dismissal or resignation of the manager.
- NatPharm shall retain all allocated vehicles on separation from employment....."

From the above provisions of the Transport Policy, it is clear to me that a manager was entitled to purchase the company issued vehicle upon satisfying certain conditions. I don't interpret that entitlement to mean that the manager concerned had a right of retention before formally purchasing that vehicle. In the heads of argument and oral submissions, it was argued on behalf of the respondent that the applicant had failed to prove its ownership of the vehicle. In its founding affidavit, the applicant claimed that the vehicle in contention is a Toyota Hilux registration number AEK 1508. In his opposing affidavit, the respondent does seem to acknowledge that the vehicle in question belongs to the applicant. In para 11 of his opposing affidavit he states:

"The fixed term contract does not state that the Respondent was mandated to return the motor vehicle upon termination of the contract....."

In paragraph 12 he states:

"The applicant has not indicated that my five year contractual term for purposes of obtaining the vehicle whose registration number is AEK 1508 began to run from the 1st of September 2015 through the contract which expired on the 31st August 2017...."

It is therefore clear to me that the vehicle in issue is the same vehicle that was issued to the respondent as part of his conditions of employment. That is the same vehicle to which the respondent claims a vested right to purchase based on his employment contract and the Transport Policy. The respondent's submission that the applicant failed to prove ownership of the same vehicle is therefore baseless. The principle that emerges from the *NatPharm v Nhau* and the *Nyahora* cases is that the mere fact that an employee claims a contractual entitlement

to purchase the vehicle does not vest him with an automatic right to refuse to surrender the vehicle at the request of the owner. The exercise of the right to purchase that vehicle is subject to further legal processes that have to be undertaken by the parties. Ownership rights are still vested in the applicant as the ex-employer. The applicant must initiate a sale process by making an offer to the respondent who must accept that offer. Indeed, in the *Nyahora* case, the court further noted that:

“As matters now stand, no offer has been made to the appellant by the respondent employer. The terms of the purchase have not been set. The appellant has no sale agreement on which to found his alleged right to purchase. He is not entitled to hold onto the vehicle pending agreement. As it was put by MAKARAU JP (as she then was) in *Medical Investments Limited v Pedzisayi* HH 26/2010:

“I am unaware of any law that entitles a prospective purchaser to have possession of the merx against the wishes of the seller, prior to delivery of the merx in terms of the sale agreement”⁹.

The respondent can not legally claim a right of retention of a motor vehicle that does not belong to him. Even if his claim is founded on the provisions of his former contract of employment, and the applicant’s Transport Policy, the parties still must formalise the sale of the vehicle to the applicant through an offer and acceptance culminating into an agreement of sale. The mere fact that the applicant still had some claims for the same vehicle pending before the Labour Court or a labour officer does not clothe him with a right to retain the vehicle.¹⁰ He has to surrender the vehicle and then pursue whatever claims he has against the applicant.

For the foregoing reasons, the court determines that there is merit in the application and the applicant is entitled to the relief that it seeks.

COSTS

The general rule is that costs follow the cause. In the draft order, costs were sought on the ordinary scale. It was in the answering affidavit and the heads of argument that costs were sought on the attorney and client scale. The claim for costs on that scale was not further motivated in oral submissions. For that reason, I find no basis to make an order of costs on that punitive scale.

DISPOSITION

Resultantly it is ordered that:

1. The application for *rei vindicatio* be and is hereby granted.

⁹ At page 9 of the Supreme Court judgment

¹⁰ See *Lafarge Cement Zimbabwe v Chatizembwa* HH 413/18

2. The respondent be and is hereby ordered to surrender the Toyota Hilux motor vehicle registration number AEK 1508 to the applicant's offices within forty-eight (48) hours of this order.
3. If the respondent fails to comply with the order in (2) above, the Deputy Sheriff be and is hereby empowered to seize from the respondent and deliver to the applicant the Toyota Hilux motor vehicle registration number AEK 1508 without notice.
4. The respondent shall pay costs of suit on an ordinary scale.

Dube, Manikai & Hwacha, legal practitioners for the applicant
Stansilous & Associates Law Firm, legal practitioners for the respondent