**DISTRIBUTABLE (18)**

**TENDAI SAVANHU**
v
**HWANGE COLLIERY COMPANY**

**SUPREME COURT OF ZIMBABWE**
**ZIYAMBI JA, GOWORA JA & MAVANGIRA AJA**
**HARARE, MAY 30, 2014**

*N Majuru*, for the appellant
*T Mpofu*, for the respondent

**ZIYAMBI JA**: At the end of the hearing in this matter we dismissed the appeal with costs on the legal practitioner and client scale for the reasons which follow.

The appellant, who, since 2006, had been the non-executive chairman of the respondent's board of directors, was removed from that position on 3 August 2011. Prior to his removal and in July 2011, he had been allocated for use during his tenure of office, a company vehicle, namely, a Toyota Land Cruiser registration number ACF 1290. After his removal from office he retained the motor vehicle against the consent of the respondent. All efforts to regain ownership of the vehicle having failed, the respondent instituted an *actio rei vindicatio* in the High Court for the return of its vehicle.

The *actio rei vindicatio* is an action brought by an owner of property to recover it from any person who retains possession of it without his consent. It derives from the principle that an owner cannot be deprived of his property without his consent. As it was put in *Chetty v Naidoo*[1]:

> "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).
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> 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)…"

The onus was therefore on the appellant to prove a legally recognized right of retention of the motor vehicle. The additional defences available to the appellant, namely, that he was not in possession of the property at the time of commencement of the action; or that the respondent is not the owner of the property were not pursued, it being common cause that at the relevant time, the appellant was in possession of the respondent's vehicle.

The appellant claimed a right to retain possession of the vehicle on termination of his directorship of the respondent on the basis of the alleged existence of a custom or practice that former chairpersons of the respondent were allowed, on termination of their tenure of office, to purchase the vehicles issued for their use during their employment with the respondent. It was his contention that he had a legitimate expectation that he would be offered the vehicle for purchase in accordance with that practice. His earlier stance, as set out in his plea, that the

[1] 1974 3 SA 13 (A)

vehicle formed part of the terminal benefits which were owed to him by the respondent was abandoned.

The learned Judge having heard the evidence, granted with costs the order sought by the respondent. Her reasoning is set out at pp 4-5 of her judgment[2] as follows:

> "The plaintiff's motor car policy covers employees, other than directors. It does not cover non-executive directors whose benefits are covered by resolutions of the board. There is no vehicle policy or board resolution entitling the defendant to purchase the vehicle at the end of his term. There is no contractual right to possess the vehicle. There is also no proof of an offer to purchase the vehicle either express or implied. I am not in agreement with the defendant's contention in his closing submissions that he was offered directorship on the understanding that the plaintiff would offer him his last car provided that he had to pay for it. There is simply no evidence to support that assertion. In the absence of a car policy, a board resolution entitling him to purchase the vehicle, or an offer to purchase the vehicle, the defendant does not have a claim….. on the premise that other directors have previously been offered to buy their own issues. This state of affairs does not entitle him to purchase the vehicle. The fact that the plaintiff offered previous directors their vehicles after the termination of their contracts does not bind the plaintiff to sell this vehicle to the defendant. The plaintiff has no obligation to sell the vehicle to him. The defendant is holding the vehicle against the wishes of the plaintiff. It is entirely in the discretion of the plaintiff to sell the vehicle to the defendant in the absence of an offer to sell the car or proof of some other entitlement. Similar sentiments were expressed by NDOU J in D*hege v Dell Medical Centre* HB 50/04, where he remarked as follows,
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> > 'In the circumstances it cannot be argued that the respondent …… was obliged to sell the company car to applicant. The court cannot compel a party to exercise its discretion in a particular fashion. The court can compel a part 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.'
>
> The defendant's right to use the vehicle ceased when he left the plaintiff's company. The fact that other directors were allowed to purchase their issues does not confer rights on him to purchase the vehicle. I agree with Advocate *Uriri's* contention that the hope and expectation of an offer does not justify possession of the vehicle. The defendant's expectation that the vehicle would be sold to him is not legitimate. His hold onto the

[2] Record 128-129

> vehicle is unlawful. The defendant has failed to show that he has contractual or enforceable rights against the plaintiff. He has no legal justification to continue holding onto the plaintiff's vehicle."

In his grounds of appeal, the appellant persisted in his stance that he had raised and established a valid 'defence' in the court *a quo* namely, the existence of 'a custom or practice or agreement between the parties entitling the appellant to retain possession of the vehicle in question.'

That he raised the 'defence' is apparent on the record. That he established the existence of a practice or custom or agreement is, however, not supported by the record. The court *a quo* made clear findings of fact that no such custom was proved to exist. This court, as an appellate court, will not readily interfere with factual findings made by a lower court and will do so only in limited circumstances[3] none of which have been alleged or shown by the appellant to exist in this case.

Notwithstanding the sole ground of appeal (as raised in the grounds of appeal) being the issue of the existence of a custom entitling the appellant to retain the vehicle, Mr *Majuru*, in his submissions before us, contended that the appellant was entitled to hold on to the vehicle because of exceptions to the *rei vindicatio* which exceptions he stated to be 'a legitimate expectation, an enforceable right, estoppel and a right of retention or contractual right' - what appears to me to be a hotchpotch of legal terms none of which was meaningful or applicable in this appeal except for the contractual right which I discuss below.

[3] Hama v National Railways of Zimbabwe 1996 (1) ZLR 664 at 670; Vengai v Chuma SC 3-13

It was submitted by Mr *Mpofu* that none of the 'defences' raised by the appellant constitute defences at law. In particular the sole defence relied upon in the grounds of appeal, namely, the existence of a custom entitling the appellant to retain the vehicle is not at law a defence to the *rei vindicatio*. He submitted that the judgment in *Van Breda & Ors v Jacobs* 1921 AD 330 on which Mr *Majuru* relied for this curious submission is authority for the proposition that one of the sources of law is custom and that no amount of stretching the meaning of that judgment could lead to the conclusion urged by Mr *Majuru* that a custom or practice creates a contract.

I agree with Mr *Mpofu* that the existence of custom as a form of law has no application in this matter. The concept of custom as a form of law has been explained[4] as follows:

> "Customary law is the oldest form of law known to man. In primitive communities almost the whole of the law existed in the shape of customs. The people regulated their conduct according to rules which they and their ancestors had been accustomed to observe in the past. These rules were not recorded in writing, nor were they enacted by any Sovereign, but they became binding in the course of ages through their observance by the community itself….
>
> The requisites to make a custom legally binding are four in number, namely that the custom is (a) reasonable, (b) has been long established, (c)has been uniformly observed, and (d) is certain.[5]"

The *Van Breda* case was concerned with whether or not these four requisites had been established by the respondents (Plaintiffs in the court *a quo*) in that matter. It certainly is not authority for the proposition contended for by Mr *Majuru* that a custom can be a defence to an *actio rei vindicatio*.

[4] See WILLE'S PRINCIPLES OF SOUTH AFRICAN LAW 7th ed by J T R GIBSON at p9.
[5] See WILLE *op cit* at p9 and the authorities cited at footnotes 37-42.

In any event, even if for argument's sake there existed a custom or practice that retiring chairpersons were allowed to purchase their vehicles on terms set by the respondent, it was never alleged, let alone established, that the vehicle had been offered to the appellant for purchase and if so on what terms. In the absence of an offer by the respondent which was accepted by the appellant no contract came into existence. Accordingly, the finding by the court *a quo* that no contractual or other enforceable right to retain possession of the vehicle was established by the appellant was unassailable.

As to the question of costs, it was submitted by Mr *Mpofu* that an order of costs on the higher scale was merited in this case as the appellant's conduct in pursuing this appeal was unforgivably vexatious and a waste of the court's time. We were of the view that the pursuit by the appellant of this manifestly unmeritorious appeal in what was clearly an attempt to postpone the day of reckoning, is indeed an abuse of court process. It would have been evident to any diligent legal practitioner that this appeal was devoid of merit. The order of costs on the scale of legal practitioner and client was in our view proper in the circumstances.

**GOWORA JA:** I agree

**MAVANGIRA AJA:** I agree

*Mhishi Legal Practice*, appellant's legal practitioners

*Messrs Mawere & Sibanda*, respondent's legal practitioners