ACCA ZIMBABWE
versus
CUTHBERT MUNHUPEDZI

HIGH COURT OF ZIMBABWE
CHAREWA J
HARARE, 19 March, 12 May 2021

Opposed Application – *Rei Vindicatio*

Mr G Gapu, for the applicant
Mr I Musimbe, for respondent

CHAREWA J: Applicant seeks vindication of vehicles it allocated to respondent for his use during the course and scope of his employment. Respondent argues that the vehicles are now his in terms of his contract of employment.

Background

Respondent was employed by the applicant as a business development manager. On 13 January 2016 he was charged with certain acts of misconduct of which the disciplinary tribunal found him guilty on 4 April 2016. He was subsequently dismissed from employment on 7 April 2016. The dismissal was confirmed on appeal to the Supreme Court on 14 May 2020.

Prior to his dismissal, respondent had been allocated and was in possession of vehicles bought by and registered to applicant, and which he had been given for his use during the course and scope of his employment. Upon dismissal respondent retained the vehicles. It is these vehicles, a Mitsubishi Colt Registration Number ABY 2045 and a Mitsubishi Sporeto Registration Number ABA 7682, which applicant seeks to vindicate in these proceedings. It is common cause that a third vehicle, Peugeot 306 Registration number 701-179A was transferred to respondent on the strength of a resolution by a board panel and registration was effected into his name. The congruent process was not done for the vehicles in issue.

Parties' submissions

Applicant submits that respondent refused or failed to return the vehicles in issue upon demand after his dismissal. It submits that it was not able to vindicate the vehicles at the time because the Labour Court had ordered that respondent was to revert to the position he was in prior to the disciplinary proceedings. It was only after the Supreme Court overturned the

Labour Court's decision on 14 May 2020 that applicant could institute vindicatory proceedings. Thus the issue of prescription raised by respondent does not apply. In any case, applicant submits, the prescription period for vindication is 30 years.

Applicant further submits that the employment contract between the parties did not entitle the respondent to ownership of the vehicles as he alleges. Besides there never was any verbal variation of that written contract of employment. Therefore, there are no disputes of fact at all.

For his part, respondent submits that applicant's claim has prescribed, the cause of action having arisen on 19 May 2016 or at the latest on 20 July 2016, and this application only having been instituted on 9 July 2020.

Further, he avers that, in any case, his written employment contract was amended verbally and such amendment was incorporated into the contract with the effect of entitling him to ownership of the vehicles after five years from the date of allocation. Therefore, having been allocated the Mitsubishi Colt Mitsubishi Colt Registration Number ABY 2045 in 2002 and the Mitsubishi Sporeto Registration Number ABA 7682 in 2007 he became entitled to ownership in 2007 and 2013 respectively. Applicant should thus be estopped from claiming ownership and vindicating the vehicles.

Finally, he avers that there are material disputes of fact regarding ownership of the vehicles which disputes cannot be resolved on the papers as the existence of a verbal contract is contested as is the fact that applicant confirmed that the vehicles now belonged to him. Further, issues of estoppel must, of necessity, be referred to trial.

The Law

It is trite that an owner is entitled to vindicate his property from wheresoever it is or from whomsoever is in possession of it without such owner's consent. I can do no better than quote ZIYAMBI JA (as she then was) when she aptly reiterated the legal position as follows:-

> "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."[1]

[1] *Nyahora v CFI Holdings (Pvt) Ltd* 2014 (2) ZLR 607 (S) @613 C-E

The requirements of a *rei vindicatio* are therefore that:-

1. applicant is the owner of the property
2. at the commencement of the action, the thing to be vindicated was still in existence and the respondent was in possession of the property and
3. the respondent's possession is without applicant's consent.

Consequently, it is also trite that the defences to a *rei vindicatio* are that:-

(i) applicant is not the owner of the property in question;

(ii) that the property in question no longer exists and can no longer be identified;

(iii) that the respondent's possession of such property is lawful;

Or

that the respondent is no longer in physical control of the property.[2]

Where a respondent claims ownership, the onus is upon him to prove his right to ownership or retention of the property. It is not enough for him to make a bald assertion of his claim for retention of the property but that he must refute, with demonstrable evidence, the material averments of ownership made by the applicant.

It is further trite that prescription on any debt begins to run from the date the cause of action arose. In vindicatory claims in respect of employment disputes, prescription ordinarily begins to run from the date that the employment contract is terminated. However, where a respondent has successfully challenged his suspension or termination of employment and a court order is extant that he be reinstated without loss of benefits, the right to vindication does not arise until the validity of the suspension or termination of employment is determined. Put in another way, until the date that a disputed order of reinstatement is resolved, the employer has no right to vindication, and therefore lacks *causa* for a *rei vindicatio*.[3] Prescription is thus suspended or cannot therefore begin to run until that date.

Applicant obviously misconstrues s 4 of the Prescription Act [*Chapter 8:11]* when it submits that the right to a *rei vindicatio* prescribes after thirty years. That provision relates solely to acquisition of property by prescription, not claims for debts such as in this case.

With respect to the allegations that the respondent's written employment contract was orally amended to include the term that he was entitled to ownership of the vehicles after five

---

[2] *Chetty* v *Naidoo,* 1974(3) SA 13

[3] *See Medical Investments Ltd v Pedzisayi* 2010 (1) ZLR 111, *Nyahora vs CFI Holdings Ltd* (supra), Indum Investments (Private) Limited v Kingshaven (Private) Limited) & Ors SC40/2015

years, it is trite that the respondent has the onus to demonstrate when and how such contract was amended and whether it is possible to verbally amend a written contract by a legal person orally. He must allude to the provision in his contract or a policy document or minutes of a meeting entitling him to ownership of the property to properly discharge such onus.[4]

Further, it is trite that a subsequent verbal agreement does not supersede a written contract unless adequate proof of a meeting of the minds on that oral agreement is proffered. The "four corners doctrine' presupposes that if there is any dispute between the terms of the written contract and the alleged subsequent verbal contracts, courts will confine themselves to the four corners of the pages of the written contract.[5]

It is also trite that, where material disputes of facts are disclosed and the same are not capable of resolving the parties' issues without hearing further evidence, the court may refer the matter to trial[6] or dismiss the application rather than to allow the matter to go to evidence.[7] However, a material dispute of fact is not merely denial of a claim. Rather it refers to an untenable position where averments are made in an affidavit, which averments have a direct bearing on the outcome of the matter, yet the papers which will be before the court leave it riddled with doubt and uncertainty as to the veracity of the averments, to such an extent that the court is unable to come to a conclusive decision on the merits of the application.[8]

Analysis

Has applicant's right to vindication prescribed?

Respondent's contract of employment was terminated on 7 April 2016. As at that date applicant accrued a right to vindicate its vehicles and prescription started to run in terms of s 14 of the Prescription Act. However, applicant appealed the decision of the disciplinary committee to the Labour Court on 17 June 2016. In terms of s 7 (2), the service of the notice and grounds of appeal and review of the proceedings of the disciplinary committee had the effect of interrupting the running of prescription vis-à-vis applicant's claim for vindication because the respondent in his appeal/review was claiming reinstatement and consequent retention of his benefits which included the vehicles. The Labour Court having ruled in respondent's favour on 5 October 2018, applicant had no right to vindication as the

[4] *Freight World (Pvt) Ltd v Claude Sachikonye* HH 17-17
[5] See Jesse White https//kirasystems.com
[6] *Zimbabwe Bonded Fibreglass (Pvt) Ltd v Peech* 1987(2) ZLR 338(SC).
[7] See *Mangurenje v Maphosa & Ors* 2005 (2) ZLR 44(H).
[8] *Masukusa v National Foods Ltd & Anor* 1983 (1) ZLR 132

employment relationship continued. Consequently, the right to vindication only accrued on 14 May 2020, when the Supreme Court overturned the Labour Court judgment. Prescription therefore started to run again. The present application having been filed on 9 July 2020, prescription had not run its course as three years had not elapsed. Therefore the applicant's claim has not prescribed.

Was there any contract between the parties entitling respondent to ownership after five years?

There is no dispute that the parties entered into a written contract of employment even though neither of the parties produced that contract. Neither is there a dispute that that contract did not provide that respondent would be entitled to ownership of applicant's vehicles after five years from the date of allocation. There is also no dispute that these vehicles were owned by the applicant and were allocated to respondent for his use during the course and scope of his employment. This is why respondent alleges an oral amendment to the contract to found his defence of entitlement to their retention. Hence respondent claims that he is entitled to ownership and retention of them on the basis of the alleged oral amendment to the contract.

It follows, therefore, that the respondent has the onus to prove that there was ever such an oral agreement, to ground his defence. Thus the respondent needed to traverse such facts as would show that, firstly, such agreement was ever made. Unfortunately, what is on the papers is a bald averment to such verbal change. It is not even explained or supported with case authorities as to how it was legally possible for a legal person to alter a written agreement orally, more so through one or two members of the applicant acting individually as alleged, when it is trite that a legal person acts through resolutions. Nor is it traversed by respondent how such oral agreement should take precedence over a written contract.

The fact that applicant had previously given respondent ownership of a prior vehicle issued to him, the Peugeot 306, rather than supporting his averments, belies them: in that case it is common cause that applicant's board panel, after duly meeting, recommended that ownership of the vehicle be given to respondent. That recommendation was rightly implemented, resulting in applicant transferring the vehicle to respondent. The suggestion by respondent that such recommendation translated to a policy position for all subsequent vehicles is unfounded when regard is had to Annexures A-D attached to respondent's opposing affidavit. In any event respondent is relying, for his claim to ownership and the right of retention of the vehicles in issue, not on any policy position or board recommendation, but on

a verbal amendment to his contract of employment. He does not assert that similar recommendations were made for the vehicles in issue.

Besides, respondent does not refute applicant's assertions that from the date it purchased the vehicles and registered them to itself, applicant has solely been responsible for paying all necessary licenses and insurances for the vehicles, thus augmenting its claim to ownership. The respondent has thus not discharged the onus upon him to prove his right to ownership of the vehicles in contention. No issue estoppel therefore arises.

Are there any material disputes of fact which cannot be resolved on the papers?

A material dispute of fact is not any bald assertion or allegation of a verbal agreement but arises where a respondent disputes the facts put by applicant and traverses them in such a manner as to leave the court with no ready answer to the dispute between the parties[9]. From 2016 when the first demand for the return of the vehicles was made right up until the issuance of this application, respondent made no effort to assert his rights to the purported ownership of the vehicles.

It is instructive to note that soon after his dismissal in April 2016, respondent was instructed to return the vehicles. Annex A to his opposing affidavit refers. His response, Annex B, does not allege any verbal variation to his employment contract. Rather, his position was that his contract entitled him to ownership after five years. On it being pointed out in Annex C that his employment contract has no such provision but that there was a non-binding panel resolution with respect to the one vehicle, the Peugeot 306, that had already been transferred to him, he then changed tack in Annex D to aver that the resolution was binding, was not once off and affected the vehicles in issue.

He still made no reference to any verbally amended employment contract. In fact, Annex D is a tacit recognition by the respondent that there was no agreement to vary his employment contract to entitle him to the two vehicles as paragraph three of his legal practitioners' letter unequivocally states that Mr Chiyangwa made a promise to resolve the issue. Such a promise by one member does not and cannot equate to a verbal agreement by applicant to alter the employment contract.

Even in response to this application, respondent made no counterclaim for registration of the vehicles to himself. In fact, he advances no evidential basis to dispute the material averments made by the applicant in order for the court to identify the material disputes of fact.

---

[9] See *Supa Plant Investments (Pvt) Ltd v Edgar Chidavaenzi* 2009 (2) ZLR 132 (H).

He does not dispute that applicant has always and is still paying for the vehicles' licences and insurances, as any true owner would. Nor does he explain why he has not done so himself were he the true owner. The averments by the applicant therefore sufficiently answer the questions posed by the respondent to my satisfaction. The question whether the applicant followed the wrong procedure thus falls away.

Besides, respondent cannot approbate and reprobate: in one breath he claims ownership based on an unsubstantiated verbal agreement and in the next, he claims (in paragraph 8.7 of his opposing affidavit), and an alleged right to purchase the vehicles. In any event he was offered the option to purchase the vehicles in July 2016, which offer he spurned.

Respondent filed no counterclaim for registration of the vehicles to himself. Therefore any reference to that made in the oral submissions is unsupported by the pleadings and is of no moment.

In the premises I cannot but find in favour of the applicant.

Disposition

Consequently, it be and is hereby ordered that

1. The respondent shall deliver to the applicant a Mitsubishi Colt motor vehicle registration number ABY2045 and a Mitsubishi Sporeto motor vehicle registration number ABA 7682 within 48 hours of service of this judgment.
2. In the event that the respondent does not deliver the motor vehicles to the applicant as ordered, the Sheriff or his lawful deputy is ordered and directed to attach and remove the motor vehicles from the respondent or any third party in possession thereof, and deliver them to the applicant.
3. The respondent shall pay costs of suit

Messrs Scanlen & Holderness, applicant's legal practitioners
Messrs IEG Musimbe & Partners, first respondent's legal practitioners