ZIMBABWE BROADCASTING (PVT) LTD
versus
PATRICK MAVHURA

HIGH COURT OF ZIMBABWE
CHINAMORA J
HARARE 27 July 2020 and 24 November 2021

Opposed urgent court application – *rei vindicatio*

Mr F Moyo, for the applicant
Mr W Chagwiza, for the respondent

CHINAMORA J:

Background facts:

The application before me is for an order of *rei vindicatio*. Mr Patrick Mavhura was employed by the applicant in various capacities ending up as Chief Executive Officer when his contract was terminated on 31 August 2019. During the tenure of his employment, the respondent was entitled to the use of a company vehicle, which he did not return when his contract of employment ended. The applicant requested the respondent to surrender the motor vehicle forthwith, but he failed to return the said vehicle. Consequently, the applicant filed an urgent court application on 1 July 2020 seeking recovery of its property, namely, Chevrolet Trailblazer motor vehicle. The respondent opposed the application and raised three points *in limine*, which can be summarized as follows:-

(1) Ms Patricia Muchengwa, lacked authority to depose to the applicant's founding affidavit.
(2) The application is not urgent;
(3) There is a material dispute of fact which cannot be resolved on the papers without hearing oral evidence.

I will first examine the points *in limine* in turn.

Preliminary points

Authority to depose to affidavit

The respondent contended that the deponent to the affidavit did not produce a board resolution authorizing her to institute proceedings in the name of the company. As such, it was argued that there was no application before the court. The law relating to deposing to affidavits is settled in this jurisdiction. An affidavit can be signed by a person who has knowledge of the facts and can swear to their accuracy. In this connection, it is pertinent to refer to the case of *African Banking Corporation of Zimbabwe Limited t/a BancABC* v *PWC Motors (Pvt) Ltd & 3 others* HH-123-13. In that case MATHONSI J held as follows:

> "I am aware that there is authority for demanding that a company official must produce proof of authority to represent the company in the form of a company resolution. However, it occurs to me that that form of proof is not necessary in every case as each case must be considered on its merits: *Mall (Cape) (Pvt) Ltd* v *Merino Ko-Opraisie* BPK 1957 (2) SA 345 (C). 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 the unauthorized person …. To my mind the attachment of a resolution has been blown out of proportion and taken to ridiculous levels. Where the deponent of an affidavit states that he has the authority of the company to represent it, there is no reason for the court to disbelieve him unless it is shown evidence to the contrary [but] where no such contrary evidence is produced the omission of a company resolution cannot be fatal to the application …"
> **[My own emphasis]**

It is noteworthy that the respondent did not produce any evidence to show that Ms Muchengwa acted without authority or was on a frolic of her own. In fact, the applicant averred that the respondent, who was the applicant's Chief Executive Officer for a number of years, was aware of Ms Muchengwa's authority to act in such matters in her capacity as company secretary. I have no reason to disbelieve the applicant. As such, the objection is without merit and I dismiss it.

The matter is not urgent

The second point *in limine* raised was that the application was not urgent as the respondent had been in possession of the vehicle since August 2019 when his contract was terminated. It was submitted that the applicant took no action to repossess the vehicle from that time till the filing of the application. Because the applicant did not treat the application with urgency, the respondent submitted that it should not be treated as an urgent application. He further contended that an urgent

application must be accompanied by a certificate of urgency. My view is that the applicant has proceeded on the premise that it owns the vehicle in question and, consequently, has the right to claim it from whoever is in possession. I was also satisfied that on a consideration of the consequences of failure to act, the application was rightly brought as an urgent one. *(Northen Farming (Pvt) Ltd v Vegra Merchants (Pvt) Ltd* HH 328-13). In the result, I find no merit in the point *in limine* raised and dismiss it.

Material dispute of facts

Finally, on preliminary points, the respondent averred that in its letter terminating his employment, the applicant asked the respondent to return all its property. He submitted that he submitted everything including the laptop he used. The respondent continued that the applicant returned the laptop advising him that he could keep it as his own. Regarding the vehicle, the respondent contended that he retained it on the contractual understanding between the parties that the applicant would sell it to him. He said the agreement he had with the applicant vis-à-vis the vehicle was both written and verbal. The respondent referred to oral discussions he had with the applicant concerning his entitlement to the vehicle. He went on to allege that the oral discussions took place between him and Ms Patricia Muchengwa in her capacity as the company secretary. The respondent attached his appointment letter dated 24 November 2014 marked Annexure "H" (at page 23 of the record). This letter states that the respondent was entitled to a salary, incentives and allowances for the scale of General Manager in line with ZBC policy. He then referred to the ZBC policy which made the salary of General Manager commensurate with his as an Acting Chief Executive Officer. The respondent attached a copy of the contract Allan Chiweshe who was General Manager since 17 December 2008.

Additionally, the respondent referred to clause 3.3 of Mr Chiweshe's contract which provided that the position of General Manager entailed entitlement to an executive company vehicle in the range of a Prado four wheel drive or its equivalence. The respondent proceeded to assert that as a result of this clause, he was allocated a Chevrolet Trailblazer in 2016. He drew the court's attention to a provision of the same clause 3.3 which allowed him to purchase the vehicle at the book value of *"the vehicle's depreciated cost at the expiry of three years, retrenchment or any eventuality".* The respondent argued that a period of three years had lapsed since the time he became entitled to the vehicle, the date of reckoning being the date he was appointed Chief

Executive Officer. In addition, the respondent pointed out that according to the ZBC policy the depreciation rate for vehicles was set at 20% per annum, meaning that the vehicle had depreciated to a value of zero if its value was worked out from November 2014 to November 2019. A final point made by the respondent is that, a memorandum dated 28 March 2018, marked Annexure "J" (at page 51-52 of the record), from Ms Muchengwa to the respondent reads:

> **"RE: INTERPRETATION OF CONTRACT OF EMPLOYMENT**
>
> The above subject matter refers.
>
> This write up is based on the letter from the Chairman of the Board, Father Munyoro dated 24 November 2014.
>
> This letter served to officially appoint you as the Acting Chief Executive Officer of ZBC for a stated period of 5 months calculated from 30th April 2015. The appointment was subsequently extended as shown above.
>
> … … …
>
> Suffice it to say recourse had to be at the GM's contractual benefits as stated in the policy or summarized in a letter to a person in that position. The 17 December 2008 letter of appointment to the position of GM of one Mr A Chiweshe becomes handy. This is very straightforward in that the A/Chief Executive Officer had from the 24th of November 2014 to be offered the benefits stated in the letter. Further, in terms of clause 3.3 which reads:
>
> (a) You will be entitled to a personal executive company vehicle allocation in the make or range of Prado 4 x 4 or equivalent. This personal vehicle allocation will be sold to you at book value of the vehicle's depreciated cost at the expiry of three years, retrenchment or any other eventuality.
> (b) Access to vehicle loans.
>
> This clause is clear in meaning. So from 24 November 2014 up to 23 November 2017 the A/CEO has the right to be sold the motor vehicle which he became entitled to at the date of his appointment. The A/CEO's term of appointment was never interrupted at all as shown above. In other words, at any given time he had his contract extended. The same applies with the benefits that came with the initial appointment. They were invariably extended in each and every letter of extension of term as stated above. The entitlement is not based on the usage of the vehicle but on date of appointment. In order to exercise the right to purchase the vehicle the following conditions have to be satisfied.
>
> (a) Date of appointment.
> (b) Date of entitlement, being three years calculated from the 24th of November 2014".

In light of the clause 3.3 of the contract between the parties and the memorandum from Ms Muchengwa to the respondent, there is no apparent dispute of facts which is incapable of resolution on the papers. The documents are self-explanatory and no viva voce evidence is required to

illuminate what is clearly unambiguous language employed by the parties. My conclusion is informed by the wisdom of MATHONSI J (as he then was) in *The Railways Enterprises t/a Paroun Trucking* v *Dowood and David Bruno Luwo* HB 53-16, where the learned judge said:

> "a party does not create a real dispute of facts by merely denying the allegations made by the applicant in its founding affidavit. That party must present a story in its defence which would lead the court to the conclusion that indeed a dispute of facts exists that cannot be resolved on the papers"

I have also derived guidance from *Supa Plant Investments (Pvt) Ltd v Chidavaenzi* 2009 (2) ZLR 132 (H), where MAKARAU J (as she then was) appositely observed:

> *"A material dispute of fact arises when 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."*

Nothing precludes this court from taking a robust approach. As I have said, the contract of employment and the memorandum written by Ms Muchengwa on 18 March 2018 speak for themselves. The position regarding the right to purchase (or be sold) a company vehicle has been spelt out in a manner which requires no further clarification or elaboration by oral testimony. Accordingly, I dismiss this point *in limine* for lack of merit. I will now examine the dispute in *casu* on the merits.

The merits of the case

The respondent's contention was that he is entitled to the vehicle in terms of clause 3.3 of his employment contract. It is evident that this clause entitles to purchase his allocated vehicle if three years have lapsed from the date of his appointment. I have already formed the view that the memorandum from Ms Muchengwa puts the issue beyond doubt. The applicant placed reliance on the *rei vindicatio* principle, arguing that on the basis of *Stanbic Finance Zimbabwe Ltd v Chavhunga* 1999 (1) ZLR 262 (H), an owner cannot be deprived of his property against his will and can recover it from whoever is holding it. The answering affidavit (in paragraph 5 at page 56 of the record) makes this obvious as it states:

> "Applicant owns the motor vehicle as respondent has rightly conceded that he has not paid for same. There are no disputes of fact in that regard".

Given the agreement entered into by the parties when the respondent took employment with the applicant, the reliance on *rei vindicatio* to seek repossession of the Chevrolet Trailblazer motor vehicle is misplaced. Of course, the principle has exceptions, principal of which is that the respondent has to prove right of retention. In *casu*, the respondent has demonstrated that that his contract of employment gives him the right to retain the motor vehicle. There is nothing ambivalent about the clause which permit him to purchase the vehicle, as the method of calculating the sale price is stipulated. The cases cited by the applicant on right of first refusal do not apply in this matter, because the respondent was not given such a right. The contract merely allowed him to purchase the vehicle he was using if he satisfied the criteria stipulated in clause 3.3, and the applicant has not presented anything before the court to show that the respondent was not entitled to be sold the vehicle. If a right of first refusal was part of the contract the situation would have been different. (See *Eastview Gardens Residents Associations* v *Zimbabwe Reinsurance Corporation Ltd and Others* SC-90-02). I am satisfied that the basis for the relief sought has not been established by the applicant. Let me now consider the question of costs.

Costs of suit in this matter

Generally, costs follow the result. The applicant has asked for punitive costs. However, in order for a litigant to successfully claim costs as between attorney and client scale, he/she or it must show that the other party deserves to be penalized for its conduct of the litigation. The applicant based its claim on the remedy of *rei vindicatio*. It cannot therefore be said that the applicant litigated in bad faith, even though they have failed to make out a case for the order they asked for. Finally, parties must always realize that costs are in the discretion of the court. Accordingly, in the exercise of my discretion, I have decided that costs on the ordinary scale will suffice in this case.

Disposition

In the result, the application is dismissed with costs.

Scanlen & Holderness, applicant's legal practitioners
Kwenda & Chagwiza Attorneys, respondent's legal practitioners