ZIMBABWE COMMERCIAL FARMERS UNION

versus

PETER GAMBARA

HIGH COURT OF ZIMBABWE

MATHONSI J

HARARE, 11 OCTOBER 2012 AND 17 OCTOBER 2012

*P. Kawonde*, for the Applicant

Respondent in person

**Opposed Application**

MATHONSI J: The Respondent was, until his resignation on 29 February 2012, employed by the Applicant as its Acting Director. As an employee of the Applicant he was entitled to use of the employer’s vehicle, an Isuzu Extended Cab Registration number ABK 7760.

At the time of his resignation, the Respondent was required to surrender the vehicle to the Applicant but elected to retain it because he was owed certain sums of money by the Applicant. His decision was contained in a letter he wrote to the Applicant on 29 February 2012 which reads in pertinent part as follows;-

“29th February 2012

The Acting Director

Zimbabwe Commercial Farmers Union

SURRENDERING OF UNION ASSETS

Further to my letter of the 24th February 2012 to you on the payment of my outstanding

terminal benefits, I note with concern that you have failed to provide me with a date

when I should expect to get these benefits.----------------------------------------------------

I have doubts that the Union will be able to pay me within a reasonable time (defined by

the Supreme Court as 14 days) and in order to put pressure on it to pay me, I shall delay

the handover of the vehicle that was in my possession i.e ABK 7760 until such time that

the Union has paid me my terminal benefits. I will be able to deliver the vehicle as soon

as I am paid. If I do not hear from you within 48 hours on the proposed payment dates, I

shall take it that you are OK with this arrangement.”

Although the Applicant, through its legal practitioners, demanded the motor vehicle, by letter dated 8 March 2012, the Respondent was unmoved. As a result the Applicant filed this application in which it seeks the following order;-

“IT IS ORDERED THAT:-

1. The Respondent or any person in possession of the Applicant’s property namely Isuzu Extended Cab registration number ABK 7760 issued by the Applicant to the Respondent, be and is hereby directed to surrender the said property to the Deputy Sheriff upon service of this order.
2. In the event that the Respondent or any person in possession of the aforesaid vehicle fails to comply with this order, the Deputy Sheriff be and is hereby authorised to seize and attach such property and hand it over to the Applicant.
3. The Respondent shall pay the costs of this application.”

In its founding affidavit sworn to by the Acting Director, Shadreck Tsimba, the Applicant stated that the Respondent’s entitlement to the motor vehicle ended with his employment contract. He possesses no lawful or justifiable reason to hold on to the vehicle and whatever perceived entitlement to terminal benefits should be subject of a separate claim divorced from the vehicle.

In his opposition the Respondent raises a 2 prolonged defence to the application namely that at the time of hand over take over, the Applicant agreed with his proposal to hold on to the vehicle until his terminal benefits were paid and for that reason, he possesses the vehicle “by mutual consent”. Secondly, he pleads set off in light of the fact that he is owed some money which he is entitled to set off against the value of the motor vehicle, a value that has not been determined.

In support of his claim that the Applicant consented to his possession of the vehicle, the Respondent has attached an unhelpful “asset transfer form” signed by the parties on 1 March 2012 showing that he surrendered an HP Laptop to the Applicant and has an endorsement that “vehicle not handed but with 77902km as mileage.”

By any stretch of the imagination that document cannot be said to contain an agreement that the Respondent should retain the vehicle. What is more, a few days after the purported agreement, the Applicant’s legal practitioners addressed a letter to the Respondent on 8 March 2012 demanding delivery of the vehicle. I am not persuaded that there was ever an agreement for the Respondent to retain the vehicle and make a finding that he has that vehicle without the owner’s consent.

What has happened in this matter is that the Applicant has brought a vindicatory action against the Respondent as owner of the vehicle which was given to the Respondent as a benefit in terms of his employment contract, a contract which has been terminated. As stated by GOWORA J (as she then was) in *Zimbabwe Broadcasting Holdings v Gono* 2010 (1) ZLR 8 (H) at 9G-H and 10A;-

“Our law is to the effect that once an employee has been suspended or dismissed from

employment, any benefits extended to such employee from that relationship cease. In

*Chisipite Schools Trust (Pvt) Ltd v Clark* 1992 (2) ZLR 324 (S) GUBBAY CJ stated;-

‘Pending the removal of suspension, the Respondent was not entitled, to the

continued enjoyment of the benefits comprising the free occupation of the

Headmistress’s house and the continued use of the motor vehicle. A labour

relations officer cannot order the Respondent to surrender these particular

benefits. Consequently, the Applicant being unable to resort to self help

approached the High Court for relief. I consider it was justified in doing so.’”

At 11A-B the learned Judge observed;-

“The vehicle was a benefit afforded to the Respondent in terms of a contract of

employment with the Applicant. That contract has since been terminated. The

Respondent has therefore to establish a defence to the claim by the Applicant for the

return of its vehicle to its possession.”

I am in agreement with that pronouncement. *In casu* the Respondent insists that he is entitled to set off what is owed to him by the Applicant against the value of the vehicle. That value has not been agreed. What he is owed has not been agreed. In fact the Applicant has argued that the Respondent is only owed a sum of $321,89. The question which arises is whether the Respondent can rely on set off in this matter.

Set off or *compensatio* is a method by which debts are extinguished simultaneously *ipso jure*. *McCroncy v Sibanda* 1991 (2) ZLR 28 (H) at 31A. As stated by the learned author R.H. Christie, *Business Law in Zimbabwe*, 2nd Edition, *Juta & Company Ltd* at page 112-113;-

“Set off, or *compensatio*, comes into effect when two parties are reciprocally indebted to

each other, a natural obligation being sufficient………….The reciprocal debts must be

liquidated in the sense of being either admitted or capable of easy and speedy proof.

There must be true reciprocity of debts, in the sense not only that they must be owing

between the same parties but that in respect of each debt each party must have been

acting in the same capacity.”

*In Commissioner of Taxes v First Merchant Bank Ltd* 1997 (1) ZLR 350 (S) 353 C GUBBAY CJ said of set off:

“At common law, set off or *compensatio* is a method by which mutual debts, being

liquidated and due, maybe extinguished. It takes place *ipso jure*, If the debts are equal,

both are extinguished; if unequal, the smaller is discharged and the larger is

proportionally reduced.”

I had occasion in SMM Holdings Pension Fund v Fidelity Life Assurance Company HH 280-12 to comment on an attempt to set off a debt sounding in money against the value of shares. I stated at page 19 that;-

“More importantly, I am not persuaded that the requirements of set off have been

established in this matter. It is a requirement that the debts or obligations must be of the

same nature, and liquidated. The Defendant sought to set off money against shares. The

value of shares fluctuated. In addition, the amount owed to the Defendant, even

assuming it was able to prove entitlement, is not what the shares were worth at the time.”

I stand by that pronouncement which, in my view, has equal application to the facts of the present matter. The Respondent cannot set off the vehicle whose value has not been determined against the controverted claim for terminal benefits. That remedy is simply not available to him.

It remains for me to deal with additional evidence submitted by the Respondent and attached to his heads of argument. Specifically the Respondent attached an arbitral award in his favour that he be paid some money. Granted, the Respondent is a self – actor but there are basic rules of this court that cannot be derogated from in these proceedings. In terms of rule 235 of the High Court of Zimbabwe Rules, 1971;-

“After an answering affidavit has been filed, no further affidavit may be filed without the

leave of the court or a Judge.”

The Respondent did not seek leave to introduce the award but merely smuggled it into the court record attached to his heads of argument. He was not entitled to do that. I have therefore disregarded that evidence. In any event, even if there exists an arbitral award in the Respondent’s favour for payment of money, it does not entitle him to retain the applicant’s vehicle. What he has done is to resort to self-help which is as unacceptable as it is illegal. He cannot be the executioner in his own case.

The applicant is entitled to the return of its motor vehicle. The Respondent is at liberty to pursue whatever remedies he has regarding his terminal benefits, if any.

Accordingly it is ordered that;-

1. The Respondent or any person in possession of the Applicant’s property namely an Isuzu Extended Cab Vehicle registration number ABK 7760 be and is hereby directed to surrender the said vehicle to the Deputy Sheriff upon service of this order.
2. In the event of failure to comply with paragraph 1 above, the Deputy Sheriff be and is hereby authorised and directed to seize the said vehicle and deliver it to the Applicant.
3. The Respondent shall pay the costs of this application.

*Kawonde & Company*, Applicant’s Legal Practitioners