ZIMNAT LIFE ASSUARANCE COMPANY LIMITED
versus
EDWIN TSVERE

HIGH COURT OF ZIMBABWE
CHIRAWU-MUGOMBA J
HARARE, 10 June & 26 September 2019

OPPOSED MATTER

S Muzondiwa, for the applicant
C McGown, for the respondent

CHIRAWU-MUGOMBA J: On 10 June 2019, I gave judgment *ex temporae* in favour of the applicant in an application for *rei vindicatio* as follows:-

1. The respondent be and is hereby ordered to surrender applicant's motor vehicle a Hyundai SantaFe Registration Number AEN6878 within 48 hours.
2. In the event that the respondent fails to deliver the aforesaid motor vehicle in terms of paragraph 1, the Sheriff or his lawful assistant be and is hereby authorised to seize and attach the aforesaid motor vehicle wherever it can be found and deliver same to the applicant or its representative.
3. Leave is hereby granted to the applicant to serve this order through its legal practitioners.
4. The respondent shall pay the costs of suit.

I have been requested to give reasons for the judgment. These are they.

The roots of the dispute lie in a terminated employer-employee relationship. According to the applicant, the respondent was formerly employed by the applicant as its business relationship manager. On 27 November 2018, the applicant gave notice to the respondent of its intention to retrench him. This was through a letter addressed to the

respondent by the applicant. In that letter, the respondent was invited to a meeting scheduled for the 7th of December 2018 to discuss his retrenchment package. The parties failed to agree on terms following deliberations at the respondent's Works Council. The applicant does not make it clear what occurred thereafter but it seems that the applicant proceeded to pay the statutory dues after having obtained a tax directive from ZIMRA and also notified the respondent of the same. The calculated amount was paid to the respondent and presumably utilised by him. By a letter dated the 10th of January 2019, applicant's Chief Operating Officer addressed a letter to the respondent notifying him *inter alia* that he had to surrender the motor vehicle in dispute that was issued to him on a lease arrangement. Should he consider buying the vehicle, discussions would only be held after he surrendered it.

In response, the respondent submitted that he had not utilised the retrenchment package. He averred that the applicant is not the owner of the vehicle but only facilitated the hire purchase arrangements. The car is owned by Zimnat Financial Services (Pvt) Ltd. To support his claim, the respondent attached a registration book for the vehicle in the name of Zimnat Financial Services (Pvt) Ltd. He stated that the car was bought as part of his condition of employment as a car loan benefit. He personally sourced the vehicle and had actually entered into an agreement of sale with the owner. He averred that the applicant had not advised him of its refusal to his proposal to purchase the vehicle in his letter dated the 14 January 2019. He submitted that he was in legal possession of the vehicle since he was given an option to purchase the vehicle in the letter dated 19th December 2018. He stated that the car was in a good condition since he intended to own it after payment of the purchase price in full which figure he put at $36 000.20 as the outstanding balance.

In answer, the applicant submitted as follows: - that the respondent was confusing issues by attaching the registration book and an agreement of sale between him and one Gift Mandiyanike. The crux of the matter is that when the respondent was employed by the applicant, he was entitled as part of his conditions of employment to a motor vehicle. How the motor vehicle was procured was not the concern of the respondent. The motor vehicle was purchased by the applicant from Zimnat Financial Services (Pvt) Ltd a wholly owned subsidiary by the applicant. The applicant submitted that the letter by it to the respondent made it clear that the respondent should surrender the vehicle and that any discussions would only be entertained after the surrender of the vehicle. The respondent only allegedly made a proposal to purchase the vehicle after being notified that he had to surrender the vehicle first.

The applicant denied that the respondent was given an option to purchase the vehicle especially in the face of the fact that he earlier held the view that the applicant is not the owner of the vehicle. It is the applicant that gave the respondent the motor vehicle and therefore once the employment relationship was terminated, the respondent had no right to hold on to the vehicle.

At the hearing, Mr *Muzondiwa* for the applicant made the following submissions. The respondent is in possession of the *res.* Proof of ownership involves proof of the acquisition of the *res.* Zimnat Financial Services is a wholly owned subsidiary of the applicant. He cited the case of *Chetty* v *Naidoo,* 1974(3) SA 13. The vehicle was issued to the respondent who is a former employee of the applicant as part of his terms and conditions of employment. The respondent averred that the vehicle belongs to applicant's subsidiary but the respondent was employed by the applicant and not its subsidiary. This was the same situation in *Nyahora* v *CFI Holdings (Pvt) Ltd*, 2014 (2) ZLR 607 (S). The respondent was not privy to the lease agreement between applicant and the subsidiary. In terms of section 2(1) of the Road Traffic Act [*Chapter 13:11],* the applicant falls into the definition of 'owner' of a motor vehicle. The respondent has no right of possession since this depended on his status as an employee and once that status is gone, the applicant is entitled to the remedy of *rei vindicatio.*

Mr *McGown* for the respondent made the following submissions. It is trite that an application falls or stands on its founding affidavit. The applicant failed in its founding affidavit to lay a basis for the granting of the order sought. The applicant failed to prove that it is the owner of the vehicle. The vehicle belongs to Zimnat Financial Services (Pvt) Ltd. The applicant merely facilitated the acquisition of the vehicle and the respondent intends to purchase it and keep it. The applicant produced no evidence to show that the vehicle has been paid for in full. The agreement attached to the answering affidavit cannot constitute proof of ownership. It is the respondent who actually sourced for the vehicle.

In my view what is apparent from the affidavits and supporting documents is that the respondent is a former employee of the applicant his employment having been terminated through a retrenchment process. I note that the respondent in his opposing affidavit made a half-hearted attempt to seemingly challenge the process but invariably it was accepted by all parties that the relationship is now that of a former employer/employee. The respondent has not denied that he obtained the vehicle in the course of his employment with the applicant

and that he is holding on to it ostensibly on the basis that it does not belong to the applicant and that he is still waiting for a response for his offer to purchase the vehicle. The legal questions to consider are whether or not the applicant has met the requirements for *rei vindicatio* and whether or not the respondent has any valid defence(s)?

The law relating to *rei vindicatio* has been set out in a plethora of cases in this and other jurisdictions- see *Jolly* v *A Shannon and anor*, 1988(1) ZLR 78(HC); *Chetty* v *Naidoo (supra); Stanbic Finance Zimbabwe* v *Chivhunga* 1999 (1) ZLR 262; *Chitungwiza Municipality* v *Karenyi*, HH-93-18 and *Clover Leaf Motors Group (Pvt) Ltd* v *Zhou and Anor*, HH-241-18; *Savanhu* v *Hwange Colliery*, SC 8-15. It seems that the majority of cases arise in the context of employment relationships.

In *Nyahora* v *CFI Holdings (Pvt) Ltd* at 613 C-E ZIYAMBI JA (as she then was) 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."

From these and other authorities therefore, the recognised requirements are as follows:-

1. That applicant is the owner of the property
2. That 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. That the respondent's possession is without his consent.

The *Nyahora* decision makes it clear that there are recognized defences to a claim of *rei vindicatio*. These have also been set out in a plethora of cases as follows:-

(i) that the 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

(iv) that the respondent is no longer in physical control of the property – see *Chetty* v *Naidoo* (*supra*), *Residents of Joe Slovo Community* v *Thubelisha Homes* 2010 (3) SA 454 (CC).

In my view, a scrutiny of the defence(s) proffered by the respondent will also address whether or not the requirements for *rei vindicatio* have been met by the applicant. The requirement that the *res* must have been in existence at the time is not an issue since the respondent has confirmed that he is still in possession of the vehicle. The major defence of the respondent is that the motor vehicle does not belong to the applicant. He also seemingly relies on some right of retention of the vehicle pending the outcome of his 'offer' to purchase same. I find the contentions by the respondent to be fallacious. He does not deny that he was given the vehicle in the course of his employment. He seems to want to make something out of the fact that the vehicle as per the registration book belongs to Zimnat Financial Services (pvt) Ltd. Apart from the fact that a registration book is not proof of legal ownership – see *Air Zimbabwe (Pvt) Ltd and Anor* v *Nhuta and Ors*, SC-65-14, the critical fact is that had the respondent not been employed by the applicant, he would not have been availed the motor vehicle. The applicant would not have been able to avail the motor vehicle had it not had some legal entitlement to it. It smacks of double standards for the respondent to 'cry wolf' and yet in the course of employment with the applicant, he never raised the issue that he was not supposed to get the vehicle since it did not belong to his employer. It suited him then and only upon retrenchment did he turn around to claim that the vehicle was not the applicant's.

The respondent perhaps not realizing this unwittingly admitted that the vehicle belongs to the applicant. In paragraph five of his opposing affidavit he stated as follows, "the *car was bought as part of my condition of employment as a car loan benefit".* I do not read that to mean that he was employed by the subsidiary but by the applicant. To that extent, I agree with the submission by Mr *Muzondiwa* that there was no employment contract between the respondent and the subsidiary company. Further in the second part of the same paragraph, he boldly stated that, *"the applicant did not advise me of the refusal to the proposal to purchase the car as requested in the 14th of January 2019 letter……."* The proposal was not made to the subsidiary but to the applicant. The respondent stated that the outstanding amount for the vehicle is $36 000.20 that he intended to pay. In support he attached annexure D. This argument is again a fallacy because that annexure shows the client's name as "Zimnat Life Assurance Co" which is the applicant. The respondent was

never privy to the acquisition of the vehicle by the applicant from the subsidiary company and I fail to see how he can claim that the vehicle does not belong to the applicant especially when his own supporting document confirms otherwise. This annexures supports the applicant's contention that it has a lease agreement with its subsidiary in respect of the vehicle. The applicant as correctly submitted by Mr *Muzondiwa* is well covered in the definition of owner in accordance with the Road Traffic Act. On that basis, the applicant has met the first requirement that it is the owner of the motor vehicle.

The assertion by the respondent in his affidavit that he wishes to liquidate the outstanding amount by 1 November 2022, "as *earlier agreed with Zimnant Financial Services"* is not correct as there was never any such agreement. The respondent's further argument as advanced by Mr *McGown* that he is the one who sourced the vehicle does not take his defence any further since he did not make payment of the purchase price to the seller. The respondent was advised in no uncertain terms that he had to surrender the vehicle first before any discussions on purchasing the vehicle would take place. By refusing to surrender the vehicle, the respondent acted in bad faith and his defence falls in the realm of coming to court with dirty hands.

Even if it is assumed that the respondent is still awaiting to be advised on whether or not he can purchase the vehicle, this does not give him the right to hold on to it. In paragraph six of his opposing affidavit, he invokes a legitimate expectation of purchasing the vehicle when he stated as follows, *"The car is in pristine condition and maintained well and I intend to own the same after payment of the full purchase price.* I can do no better than make reference to the *Nyahora* decision when the court stated as follows (at page 614 – B-E)

> "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:
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> > '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'.
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> The appellant's further claim that he had a legitimate expectation to purchase the vehicle is, in my view, also without merit. It seems to me that whatever expectation he had to purchase the vehicle is merely that - an expectation. It has no legal basis. It is not justiciable. It cannot be converted into a claim of right".

The refusal by the respondent to surrender the vehicle despite demand means that the applicant has met the third requirement for *rei vindicatio.*

In the final analysis, the applicant proved its case for *rei vindicatio* on the basis that it is the owner, that the vehicle as confirmed by the respondent is still in existence and that the respondent is keeping it against applicant's will. On the other hand, the respondent's defence(s) as shown above have no legal basis. The respondent should simply render unto Caesar, what belongs to Caesar. For those reasons, I granted the order as prayed for.

Atherstone and Cook, Applicant's Legal Practitioners
Venturas and Samkange, Respondent's Legal Practitioners