CMED (PRIVATE) LIMITED
and
ROBERT DOMBODZVUKU
versus
ARTHUR SHINGAI MUTASA

HIGH COURT OF ZIMBABWE
TAKUVA J
HARARE, 18 November 2013 & 7 October 2014 & 12 November 2014

Opposed Court Application

M. Kamdefwere, for the applicant
J.S. Mandizha, for the 1st respondent
T.G. Muskwe, for the 2nd respondent

TAKUVA J: This is an opposed application for *rei vindicatio* aimed at recovering applicant's assets namely motor vehicles in respondents' possession.

The facts are as follows:-

The first and second respondents were employed by the applicant as Managing Director and General Manager respectively. Both were charged with and dismissed for acts of misconduct by the applicant on 7 April 2004. Aggrieved by their dismissal, they both filed an application for review in the Labour Court seeking the setting aside of the proceedings leading to their dismissal. The application was dismissed resulting in respondents applying for leave to appeal to the Supreme Court. Leave was granted and the respondents filed their appeals to the Supreme Court. However, it turned out that those appeals were irregular in that they had been filed out of the prescribed time limits set by the Supreme Court Rules.

Undeterred, the respondents filed applications for the extension of time within which to note an appeal and condonation for late filing of appeals. The applications were granted by Honourable Mrs Justice ZIYAMBI on 21 December 2009 and the appeals were set down on 16 March 2010 for hearing. These appeals were found to be defective and were subsequently struck off the roll. The respondents then filed applications before the Supreme Court seeking condonation of late filing of their regularised notices of appeal and extension of time within

which to note the appeals. These applications were dismissed by the Honourable Mr Justice CHEDA.

On 31 August 2011, the first respondent's legal practitioners wrote to applicant's legal practitioners advising that they intended to brief counsel on the possibility of lodging a constitutional application challenging the dismissal of the application for condonation of late filing of appeal. When the respondents failed to do so the applicants' legal practitioners demanded in writing the return of applicant's vehicles. This was on 29 September 2011.

On 10 October 2011 the second respondents' legal practitioners refused to release the vehicles arguing that they were still contemplating filing their anticipated constitutional application. The first respondent also adopted the same position. The applicant has therefore filed this application to recover the vehicles on the grounds that it owns the vehicles and effectively the Supreme Court ruling means that the respondents' dismissal from employment is lawful.

The application was opposed by both respondents. Mr *Mandizha* for the first respondent raised two points *in limine,* firstly that the court should decline jurisdiction on the basis of the provisions of section 89(6) as read with s 93(7) of the Labour Act [*Cap 9:08*]. Secondly, he submitted that the applicant's claim had prescribed since the cause of action occurred on 7 April 2004 when both the respondents were dismissed from employment.

Mr *Muskwe* for the second respondent raised a point *in limine* which was not in his heads of argument, namely that the motor vehicle is no longer in existence following a road traffic accident.

I will deal with these points *seriatum*. This application is anchored on the principles of the *action rei vindicatio*. There are two essential elements of the action *rei vindicatio,* namely, that the applicant is the owner of the property and that the respondent is in possession of that property. It is trite that one of the incidents of ownership is the right of the owner of a thing to claim it from whosoever is in possession of the thing and wherever it may be situate see *Gweru Tourism Promotions (Pvt) Ltd* v *Sadler & Anor* 2011 (2) ZLR 265 (H).

In *Chetty* v *Naidoo* 1974 (3) SA 13(A) JANSEN JA explained the principle thus:-

> "…… that one of its incidents is the right of exclusive possession of the res, with the necessary corollary that the owner may claim his property wherever found from whosoever holding it. 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). The owner, in instituting a *rei vindicatio,* therefore need 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". (my emphasis).

See also *Stanbic Finance Zimbabwe Ltd* v *Chivhungwa* 1999(1) ZLR 262 (H).

The Labour Court, being a creature of statute, has no jurisdiction to deal with applications of this nature – see s 89(1) of the Labour Act [*Cap 9:08*]. On the other hand, this court has inherent jurisdiction to deal with causes of action arising from the common law like the one *in casu*. See s 15 of the High Court Act [*Cap 7:06*] which states:-

> "Subject to this Act and any other law, the High Court shall have full original civil jurisdiction over all persons and over all matters within Zimbabwe".

In *Chunguete* v *Minister of Home Affairs and Ors* 1990 (2) SA 836 (WZD) 844F FLEMMING J defined the doctrine of inherent jurisdiction in the following words:-

> "an undefined power which was intended when the court was created in order to attend to basically any unlawful interference with rights".

See also *Chawora* v *The Reserve Bank of Zimbabwe* HH 59/06.

Consequently, the argument that this court lacks jurisdiction is without merit in my view and is hereby dismissed.

As regards prescription, the respondents' argument based on the Prescription Act [*Cap 8:11*] is that since the cause of action arose on 7 April 2004, the applicant should have instituted proceedings to recover its vehicles within three years from that date i.e. by 7 April 2007. Since the applicant claimed its vehicles on 22 November 2011, its claim had prescribed.

This argument is a red herring in my view. I say so for the simple reason that the prescription was interrupted by the respondents' conduct in challenging their dismissal in the Labour Court and finally in the Supreme Court. Section 19(2) of the Prescription Act states:-

> "19(2) the running of prescription shall subject to subsection (3) be interrupted by the service on the debtor of any process whereby the creditor claims payment of the debt.
> (3)……
> (4) ……
> (5) If –
>
> (a) the running of prescription is interrupted in terms of subsection (2); and
>
> (b) the creditor successfully prosecutes his claim under the process in question to final judgment ; and

(c) the interruption does not lapse in terms of subsection (3)

Prescription shall commence to run afresh on the date on which the judgment of the court becomes executable".

See also *Zimbabwe Banking Corp Ltd & Anor* v *Efficient Security (Pvt) Ltd & Anor* 2001 (2) ZLR 55 (H) where it was held that "an application to substitute a party to an action affects the party, not the cause of action. When the second respondent took over the debt as cessionary, the running of prescription had already been interrupted by the service of a summons and the action was still pending. The second respondent's claim had not therefore prescribed".

In *casu,* the last Supreme Court judgment was delivered on 22 July 2012. Prior to that date the decision to dismiss the respondents from their employment had been suspended by their appeal to the Supreme Court. Therefore, prescription started to run afresh on the 22nd day of July 2012. See *Kingdom Bank Workers' Committee* v *Kingdom Bank Financial Holdings* 2012 (1) ZLR 93 (H).

The point raised by the second respondent relating to the damage of the motor vehicle in a road traffic accident is in my view not properly before the court, in that despite having knowledge of this fact a week before the hearing, Counsel did not file supplementary heads. There is no affidavit attached to substantiate his submission. Counsel was in fact giving evidence from the bar. For these reasons, the point *in limine* is dismissed.

On the merits, the first respondent insisted that he was relying solely on prescription while the second respondent claimed to have a legal right enforceable against the applicant in that he felt the motor vehicle policy granted him the right to own the vehicle. This argument in my view is untenable in that both respondents know very well that they are ineligible to participate in this scheme. This is so because clause 2.1.3. of the MANAGERIAL STAFF MOTOR VEHICLE POLICY states:

"2.1.3. DEPRECIATION AND POSSESSION OF THE VEHICLE
Management has the option to buy vehicles issued to them after five years of use or 150 000 or whichever comes first. Where mileage comes first the vehicle will only be sold provided its three years old (i.e The manager has been using it for three years)".

It is common cause that the first respondent's term of service with the applicant did not exceed 1 year. Quite clearly the first respondent is ineligible for the scheme.

As regards the second respondent, it is obvious that he does not qualify to be covered under the ambit of the aforesaid Motor Vehicle Policy. It is not disputed that the second

respondent was confirmed as an employee of the applicant in November 2002 and his contract of employment was terminated on 7 April 2004. Simple calculation reveals that the second respondent was engaged by the applicant as an employee for roughly 17 months. The minimum period that would have entitled the second respondent is 36 months.

In my view, to argue that both respondents are entitled to own the vehicles simply because they had possession for a period in excess of three years after their dismissal is to put the cart before the horse.

Accordingly, it is ordered that:

1. 1st respondent be and is hereby ordered to surrender to applicant the Mercedes Benz E 240 motor vehicle, Government Registration Number PL 2470, Civilian registration Number 750-152 G with engine Number 11291431188418, Chassis Number WDB 2100622B483011 within seven (7) days of service upon him or his legal practitioners of this order.
2. 2nd respondent be and is hereby ordered to surrender to applicant the Peugeot 406 Motor Vehicle Government Registration Number PL 2491, Civilian Registration 752-318L with engine Number PSARFW 360469161, Chassis Number VF38BRFN281430064 within seven (7) days of service of this order on him or his legal practitioners.
3. The respondents shall bear costs of this application jointly and severally on the ordinary scale.

Muringi Kamdefwere, applicant's legal practitioners
Mandizha & Company, 1st respondent's legal practitioners
Muskwe & Associates, 2nd respondent's legal practitioners