CLOVER LEAF MOTORS GROUP (PRIVATE) LIMITED
versus
BUTHOLEZWE ZHOU
and
PATRICE SHAYAMANO

HIGH COURT OF ZIMBABWE
CHITAKUNYE J
HARARE 11 October 2017 & 10 May 2018

Opposed Application

J R Tsivama, for the applicant
M Mandikumba, for the 1st respondent
No appearance for the 2nd respondent

CHITAKUNYE J. This is an application for the return of applicant's motor vehicles that it had issued to respondents during the tenancy of their employment with applicant.

The two respondents were employed by the applicant as Group Accountant and Branch Accountant respectively until 31 October 2015 when their services were terminated on notice.

During the tenancy of their employment contracts the respondents had been issued with motor vehicles for both business and private use on terms set out in their contracts as read with applicant's motor vehicle policy.

The first respondent was issued with a Nissan Qushquai Registration No. ACX 4888 and the second respondent was issued with a Nissan Almera Registration No. ACU 6164. They were both obliged to return the motor vehicles upon termination of their contracts of employment. When their contracts were terminated on 31 October 2015 both respondents did not return the vehicles. Instead they filed a complaint of unfair dismissal against the applicant. Their effort in that direction was unfruitful as the labour court, on the 23rd September 2016, held that the applicant was entitled to terminate the contracts on notice and instead ordered that the respondents be paid compensation for loss of employment in terms of section 12 (4b) as read with section 12 C (2) of the labour Act, [*Chapter 28:0*] as amended.

Neither respondent appealed against the labour court judgement hence that decision remained extant to this day.

Despite not having appealed against the labour court judgment, the respondents refused to surrender the applicant's motor vehicle. It was in such circumstances that applicant approached this court in this application seeking an order in the following terms:-

1. The respondents shall surrender to the applicant or its authorised representative a Nissan Qushquai registration No. ACX 4888 and a Nissan Almera Registration No. ACU 6164 respectively within 24 hours of service of this order.
2. Should the respondents fail or refuse to surrender the said vehicles the Sheriff be and is hereby authorised to utilise the services of the police to repossess the said vehicles.
3. The respondents shall pay the costs of this application on a legal practitioner and client scale.

Upon being served with the application the second respondent duly surrendered the vehicle that had been allocated to him. The first respondent on the other hand opposed the application.

The first respondent contended that after being appointed as Branch Accountant on 1 March 2009, he was subsequently appointed Company Secretary for another company, Clover Leaf Panel Beaters (Pvt) Ltd (herein after referred to as CLPB) which appointment was made before he had completed his probation period with applicant. This was done without cancelling his appointment as branch accountant with applicant. The appointment as company secretary was, however, verbal. He averred that the applicant and CLPB are two different companies but with common ownership. When he was promoted to the position of Group Accountant he also continued as company secretary for CLPB.

He further contended that when the vehicle was issued to him, he used it to carry out duties for the two companies. Upon termination of his contract with applicant, he retained the vehicle as his terms of contract with CLPB also entitled him to a motor vehicle. According to first respondent it was not clear as to which company had issued him the vehicle.

In the light of the purported employment by CLPB, first respondent contended that the present application is fatally defective for non-joinder of CLPB as applicant was well aware of his issue with CLPB.

It is my view that this point *in limine* was without merit. The applicant made it clear in its founding affidavit that CLPB was its subsidiary and that by virtue of being the Group

Accountant, the first respondent was required to provide secretarial duties to CLPB. It was part of his duties and not that he was now separately employed by that subsidiary company. As will later on be discussed the applicant's stance was well corroborated by other features of the parties' relationship.

It may also be noted that. In terms of rule 87 (1) the non-joinder of a party is not fatal. Rule 87 (1) states that:

> "No cause or matter shall be defeated by reason of the misjoinder or non-joinder of any party and the court may in any cause or matter determine the issues or questions in dispute so far as they affect the rights and interests of the persons who are parties to the cause or matter."

In *casu*, the issue between applicant and first respondent can easily be decided without the involvement of CLPB.

A further point *in limine* raised was that the applicant is approaching court with dirty hands as it has not paid first respondent his terminal benefits in terms of section 13 of the Labour Act, [*Chapter 28:01*].

It is my view that the principle of dirty hands is inapplicable in the circumstances of this case. The first respondent himself has been in unlawful possession of applicant's motor vehicle from the date of termination of employment. The applicant has not refused to release the terminal package but has simply asked first respondent to surrender applicant's motor vehicle. It is the attitude of the first respondent that led to the delay in the payment of his terminal benefits, and in my view he cannot turn around and seek to benefit from his own intransigent attitude.

These points *in limine* were thus without merit and are accordingly dismissed.

In his response on the merits the first respondent admitted that his contract with applicant was terminated on 31 October 2015. He however contended that he has a right of retention of the motor vehicle by virtue of the fact that he is still employed by CLPB. He nevertheless conceded that he has not been providing any services to the applicant or to CLPB since the date of termination of contract.

Upon a perusal of the papers filed of record, with the exception of a purported answering affidavit as it was fatally defected, I was of the view that first respondent is desperately clutching at straw.

It is trite that an owner of a property is entitled to vindicate it from whoever is in possession thereof without his consent. In *Chetty* v *Naidoo* 1974 (3) SA 13 (A) at 14 it was aptly stated that:-

> "It is inherent in the nature of ownership that possession of the *res* should normally be with the owner unless he is vested with some right enforceable against the owner (e.g. a right of retention or contractual right)"

In *Nyahora* v *CFI Holdings (Pvt) Ltd* 2014 (2) ZLR 607 (S) at 613 C-E ZIYAMBI JA 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 qperson 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."

See also *Jolly v Shannon* 1998(1) ZLR 78(H) and *Arundel School Trust* v *Pettigrew* 2014 (1) ZLR 596 (H) and *Musanhi* v *Mt Darwin Rushinga Co-operation Union* 1997(1) ZLR 120 (SC)

In the present case the applicant alleged it is the owner of a motor vehicle in first respondent's possession. Such possession came about as a result of a contract of employment which contract was terminated on 31 October 2015. The motor vehicle had been issued to first respondent in terms of the contract of employment in particular clause 19 which provided that:-

> "You shall be allocated a company vehicle for business and private use. All private trips outside the radius of 60km from your official residence should be authorised by the Managing Director."

The first respondent having been issued with the motor vehicle in terms of the above contract was required to return the vehicle upon termination of the contract.

In *Zimbabwe Broadcasting Holdings* v *Gono* 2010 (1) ZLR 8 (H) at 9 GOWORA J (as she then was) made this point clear in stating that:-

> "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:-
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> > 'Pending the removal of the suspension, the respondent was not entitled to the continued enjoyment of the benefits comprising the free occupation of the Headmistress' 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.
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> I respectively associate myself with the remarks of the learned chief justice."

The above epitomises the situation that should obtain upon termination of employment between employer and employee *vis-a-vis* benefits that were being enjoyed by the employee

prior to the termination. It is unfortunate that the plethora of case authorities on this subject has not deterred litigants from clinging onto what should rightfully be returned to the employer.

Where, as in this case, a right of retention is pleaded, the onus is on the respondent to show that he enjoys such a right. The respondent must establish such right and its basis.

The first respondent's contention was to the effect that his right of retention is derived from the fact that besides being employed by applicant he had also been employed by CLPB as company secretary and this employment was not terminated. He averred that when he was issued with the motor vehicle it was not clear which company had issued him the motor vehicle. He thus used the vehicle to perform duties for both companies.

This, in my view, is a lame excuse for the continued possession of the vehicle despite the owner's demand for its return. The applicant made it clear that first respondent was employed by it and his duties as Group Accountant included providing secretarial duties to CLPB. CLPB is in fact a subsidiary of applicant.

This fact is further confirmed by the fact that first respondent's remuneration was paid by applicant; hence when the contract was terminated no remuneration was paid to first respondent. Also the first respondent ceased providing secretarial services to CLPB upon termination of the contract with applicant.

This position was also made abundantly clear to 1st respondent in a letter dated 27 November 2015 by applicant's legal practitioners when responding to first respondent's inquiry through Likbridge Consultancy Services. In their letter of 27 November 2015 applicant's legal practitioners stated, *inter alia*, as follows:-

> "We refer to your letter dated 21st November 2015 addressed to the Human Resources Manager for Clover Leaf Motors. We advise that your said letter was handed to us with instructions to respond to its contents.
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> We note that in its response to your earlier letter our client's Human Resources Manager explained that the secretarial duties that Mr Butholezwe Zhou was carrying out for Clover Leaf Panel Beaters were actually part of his employment duties as the Group Accountant for Clover Leaf Motors. With respect, this is more than adequate explanation on why and how such services would be automatically terminated once the employment contract has come to an end."

The first respondent seemed to confirm this when he conceded that he was never remunerated for the CLPB secretarial duties. Unlike his appointment as branch accountant on 1 March 2009 and appointment as Group Accountant, the so called appointment as company secretary for CLPB was done verbally. In fact he never applied for such a position in CLPB. This buttresses the applicant's argument that the secretarial duties first respondent was

performing for CLPB were in fact part of his duties as the Group Accountant. This entity called Clover Leaf Panel Beaters was a subsidiary of the Clover Leaf Motors.

It may also be noted that the first respondent did not categorically deny that he was issued the vehicle by applicant. He simply said it mattered little, if at all, who between applicant and CLPB would provide the motor vehicle and further that 'there was no clarity as to by whom I was given the motor vehicle.'

The first respondent was simply being untruthful as he should surely have known that it was the applicant that had issued him the motor vehicle in terms of Clause 19 of the contract of employment he had signed. In any case the first respondent admitted in his opposing affidavit that he had in fact offered to buy the vehicle from applicant at some point. If he did not know the owner or if the applicant was not the owner, how could first respondent offer to buy the vehicle from a non-owner? I am convinced that 1st respondent feigned ignorance on this point simply to protract his continued hold onto the motor vehicle.

The first respondents further contended that he has a right of retention of the motor vehicle based on the fact that he has not been paid his terminal benefits as stipulated in section 12 C (2) of the Labour Act. This argument is also without merit. It is common cause that after applicant had terminated first respondent's contract as at 31 October 2015, the 1st respondent was enjoined to surrender the vehicle as of that date. His retention and use of the motor vehicle thereafter was unlawful. The first respondent's challenge of the termination did not entitle him to the continued use of the vehicle. See *Chisipite Schools Trust (Pvt) Ltd* v *Clark (supra).* The challenge of the termination had the effect of delaying the release of the terminal benefits as 1st respondent was challenging it.

The applicant on the other hand had to await the outcome of first respondent's challenge of the termination which was only finalised on 23 September 2016. In the meantime applicant had called on the respondent to surrender the vehicle to no avail.

In their letter of 9 January 2017 addressed to first respondent's legal practitioners, the applicant's legal practitioners reiterated the applicant's readiness to release the terminal benefits upon the respondent surrendering the vehicle. Para 3 of that letter reads as follows:

> "We hereby place it on record that your client's termination packages are available and the only reason they have not been released is the vehicles that they have continued to unlawfully hold on to. In the circumstances your clients are hereby ordered to bring the said vehicles within twenty four (24) hours of this letter to facilitate an inspection of the same before the release of the terminal packages due to them in terms of the Labour Act."

When the parties appeared before me for the hearing, the applicant's counsel made it very clear that his client was ready and able to pay the terminal benefits in terms of the labour Act but would want first respondent to produce the vehicle for inspection as he has been unlawfully holding onto the motor vehicle for a long time. Counsel for the parties agreed to seek inspection of the vehicle by a 3rd party. Unfortunately nothing came of this as 1st respondent would not abide by what the legal practitioners had conceded was an amicable way of resolving the issue. It was clear to me that first respondent, despite unlawfully holding onto the motor vehicle, was not intent on resolving the issue. This then exposes his dilatory attitude by raising frivolous and vexatious issues as defences to the application.

The lack of *bona fide* on the part of the first respondent made it imperative that applicant first be assured that the vehicle was still available and on its state before releasing the terminal benefits to first respondent. That stance is reasonable in the circumstances of this case. If first respondent was sincere he would surely have surrendered the motor vehicle and been paid his terminal package without much ado.

After hearing the parties and considering the merits of the application, I am of the view that the first respondent's opposition has no merit. The opposition was not bona fide at all but was meant to frustrate the applicant in recovering its vehicle. It was an abuse of court process warranting censure. He clearly is unlawfully holding onto applicant's motor vehicle. He simply has no defence and has unnecessarily caused applicant to bring this application at great expense. It is only proper that first respondent be ordered to pay costs on the higher scale of legal practitioner and client scale as requested by applicant.

Accordingly it is hereby ordered that:

1. The 1st respondent shall surrender to the applicant or its authorised representative a Nissan Qushquai motor vehicle registration number ACX 4888 within twenty four (24) hours of the service of this order.
2. Should the 1st respondent fail or refuse to surrender the said motor vehicle, the Sheriff be and is hereby directed to repossess the said motor vehicle and deliver same to applicant.
3. The 1st respondent shall pay costs of this application on a legal practitioner and client scale.

Sawyer & Mkushi, applicant's legal practitioners
Muringani, Mandikumba & Partners, Respondent's legal practitioners