MHANGURA COPPER MINES LIMITED
versus
TAYENGWA DUGMORE MUSKWE

HIGH COURT OF ZIMBABWE
HUNGWE J
HARARE, 18, 29 July 2008 & 13 May 2015

Trial Cause

R Y Phillips, for the plaintiff
Respondent in person

HUNGWE J: This matter was initiated as a court application by the present plaintiff. Upon hearing argument, the court ordered that the papers filed in the court application stand as pleadings and matter proceed to discovery in the normal way. The papers show that at the pre-trial conference stage, four issues were identified for trial. These are:-

(a) Whether or not the respondent obtained possession of the Toyota Hi-lux motor vehicle registration number 424-562 E from the applicant without authority or permission;
(b) Whether or not respondent promised to return this motor vehicle to the applicant by delivering it to the offices of the Zimbabwe Mining Development Corporation as alleged on behalf of applicant;
(c) Whether or not there was a sale of the Toyota Hi-lux motor vehicle and, if so, whether the sale was to the respondent or to a company called Hoeramar Enterprises;
(d) Whether the aforesaid Toyota Hi-lux motor vehicle is no longer in the possession of the defendant;
(e) The value of the aforesaid Toyota Hi-lux motor vehicle at the time the defendant obtained possession of it.

At the commencement of trial the respondent took four points *in limine*. The first point was whether the Chairperson of the Zimbabwe Mining Development Corporation

("ZMDC") Board of directors has the authority or jurisdiction to act on her own initiative without a board resolution to set up a commission of inquiry to look at the affairs of a separate and different entity altogether. The second point was a challenge to the authority by virtue of which the present action was launched, since according to the respondent, the applicant had not authorised the launching of the inquiry and therefore there was no authority for the launching of these proceedings. Thirdly, the respondent queried the powers of a commission of inquiry to operate outside its terms of reference. Since the terms of reference did not empower the commission of inquiry to delve into the disposal of motor vehicles, then if it considered that as within its terms of reference, that commission of inquiry acted *ultra vires* its terms of reference. Finally, the respondent took the point that where correspondence had been ruled "without prejudice" it cannot be relied upon in subsequent proceedings.

After hearing the respondent as well as Mr *Phillips*, on the preliminary points I directed that the matter proceeded to trial and my ruling on these points will be made apparent in the judgment. I wish now to set out the reasons for the order which I gave then.

A point *in limine* is motion moved by one of the parties to litigation at the very beginning of proceedings aimed at usually pulling the rug from under the feet of other party, so to speak. *In limine* motions are designed to facilitate the management of a case generally by deciding difficult evidentiary issues in advance of a trial. The normal purpose of such motions is to preclude the presentation of evidence deemed inadmissible and prejudicial by the party moving the motion. Although trial courts may exercise their inherent powers to permit non-traditional uses of motions *in limine*, when used in such a fashion these become substitutes for other motions thereby circumventing procedural protections provided by trial on the merits. They risk blindsiding the other party and in some cases they could infringe a party's right to a trial. They are difficult applications to succeed upon as the trial judge at that stage will not yet have much context to rule on admissibility of evidence. Thus, in the words of JUSTICE CONLON of the United States District Court in *Hawthorne Partners* v *AT & T Technologies Inc and ENSR Corporation,* 831 F 831 Supp 1398 (1993);

> "Unless evidence meets this high standard, evidentiary rulings should be deferred until trial so that questions of foundation, relevancy and potential prejudice may be resolved in proper context. Denial of a motion in limine does not necessarily mean that all evidence contemplated by the motion will be admitted at trial. Denial merely means that without the context of trail, the court is unable to determine whether the evidence in question should be excluded. The court will entertain objections on individual proffers as they arise at trial, even though the proffer falls within the scope of a denied motion *in limine*."

The point raised by defendant should or could have been the subject of an exception. It is purely a procedural question whether the determination of such points as raised *in limine* in trial proceedings should be described as an exception or the hearing of argument on a point of law or a point *in limine* (see Rule 152 of the High Court Rules 1971).

Trial proceeded on the basis that the supporting and answering affidavit filed in the court application stood as pleadings. Dominic Mubaiwa, who deposed to same, adopted these as his evidence-in-chief before he was cross-examined. In these, he points out that he is the Group Chief Executive Officer of ZMDC. The plaintiff company is a subsidiary of ZMDC. As the Group Chief Executive Officer of the ZMDC, he is a non-executive director and member of the board at the plaintiff company. The executive director at the plaintiff is appointed by the ZMDC board as the holding company. In that capacity he is authorised to depose to the affidavits in connection with the present matter. The records of the applicant show that the defendant (respondent) obtained possession of a Toyota Hi-lux motor vehicle registration number 424-562 E from the plaintiff (applicant) when he was the non-executive Chairman of the applicant without permission or authority. Sometime in December 2004, respondent had promised, orally and in writing, to return this motor vehicle by delivering it to the offices of ZMDC in Harare. By the time the court application was launched he had not done so pleading that the motor vehicle was now a non-runner and needed tyres and that he had no resources to tow it to Harare. The respondent has no excuse for not handing over the motor vehicle. The applicant therefore seeks an order compelling him to restore the motor vehicle into its possession. Mubaiwa particularly relied on correspondence addressed to the respondent by the applicant's legal practitioners dated 24 December 2004 in which the following appears;

> "We confirm having discussed the entire matter with you and indicated to you that in our view the application is without merit but more importantly that any public debate of the contents of the application and the response of our clients to it particularly at the High Court would be most damaging to your reputation and is to be avoided. With this in mind we have discussed with yourself the settlement of this matter on the following basis:
>
> "1. That you will withdraw your Court Application and if such a withdrawal occurs before our clients file any opposing papers we will advise our clients not to seek any costs from yourself;
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> 2. That you will undertake to pay repairs for the T35 truck which as you have accepted was utilised by yourself at least on one occasion without the permission of Mhangura Copper Mines Limited. In this connection you have queried the estimated cost of repairs but of course the quantum will only be known once the repairs are completed.

> If you are unhappy with the amount then a court will have to settle any dispute arising there from.
>
> 3. That you will return the Toyota Hilux motor vehicle in the view of our client was acquired by yourself as opposed to a company in which you have an interest, irregularly and without the observance of any appropriate tender system. In this connection you have stated that you are prepared to return the motor vehicle in question but have carried out certain repairs to it and had vehicle parts affixed which you would like to remove. As indicated to you Mhangura Copper Mines remains the owner of this motor vehicle and it must be returned to it either in the condition in which it was when you removed it (which we believe will be almost impossible) or its current condition and then be examined by an independent repairer to determine the extent to which its value has been enhanced by any repair work undertaken by you or on your behalf."

Subsequent to this correspondence, applicant's legal practitioner penned yet another communication to the respondent on 7 January 2005 in the following terms:

> "We refer to the above matter and to our letter to you of 24th December 2004 and also to out telephone discussion this morning.
> We confirm that you have now agreed to deliver to the offices of the Zimbabwe Mining Development Corporation in Harare the Toyota Hilux motor vehicle registration number 424-562 E in its current condition. Delivery will be effected no later than Wednesday the 12th January 2005. Our client will then have it examined by an independent third party in order to determine the issues previously discussed with you."

The respondent replied to these two letters by way of a letter dated 12th January 2005. In it he raises the point that discussions held with Mr Mahlangu of the applicant were on a "without prejudice" basis and cannot therefore be used in legal proceedings. Secondly, he takes issue with the allegation that he had been using the Toyota Hilux for his benefit stating that he in fact has his which comparably is in a better state of repair than a 22-year old shell. He states in that letter that the only outstanding issue between him and applicant was the proof of payment for the Hilux. Since he can prove that he paid for the same therefore ownership passed to him. It no longer belongs to the applicant. He takes issue with reference to the Toyota Hilux as a runner since according to him it as a shell. He however goes on to state that as soon as he secures tyres for this non-runner he will tow it to ZMDC office in either Harare or Alaska.

When the respondent deposed to his opposing affidavit three months later, he changes his position regarding whether he had the motor vehicle in question or not. He states in the opposing affidavit for the first time that the Toyota motor vehicle has never been in his possession but in the possession of the person to who it was properly sold. When he gave his evidence in court during trial he revealed for the first time that the motor vehicle was bought

by a company called Hoeramar Enterprises. He claims that he never freely agreed to return this motor vehicle. He had however been threatened with incarceration by applicant's legal practitioner, Mr Mahlangu over this particular motor vehicle out of sheer malice. This had induced him to make undertakings regarding the vehicle. At the time of the alleged telephone conversations with Mr Mahlangu, respondent's father had been sick. Under threat of arrest and incarceration, he had proceeded to the premises of the company which held the motor vehicle and forcefully took possession of it to avoid imprisonment. He had however failed to deliver it to the applicant since it had no tyres. In his closing submissions respondent relied on the points he raised in limine. On the facts, it is clear that the motor vehicle was registered in the name of the applicant company. Once it is accepted that the deponent to the supporting affidavit was the Group Chief Executive Officer and that he expressly stated that he was authorised to depose to the affidavit, it seems to me artificial to argue that he was not entitled to vindicate his company's property especially where the person holding it has no title to it. There is no need to consider the issue whether there was a resolution specifically enjoining a commission of inquiry to probe the disposal of the motor vehicle. That vehicle was never subject of disposal. Even if it was, it was improperly taken by the respondent. As for the "without prejudice" correspondence, it is pertinent to note that applicant discovered these in its notice of discovery. In any event the correspondence did not amount to negotiation but a record of settlement to which the parties had orally agreed. The respondent's letter of 12 January 2005 was not captioned "without prejudice" and was in any event not relied upon by the applicant. I am satisfied that the reliance on the two letter was appropriate and relevant to the determination of the issues at stake. No prejudice was suffered by the respondent since these were discovered. He did not deem it fit to protest their use.

The claims against Mr Mahlangu forced *Mr Phillips* to call him to refute the same after the respondent had closed his case. Initially Mr Mahlangu remained composed as he narrated the chronology of events leading to this trial. He was at pains to demonstrate how his concern for the need by the respondent to keep his integrity intact stretched his client's patience with him. He tried everything to avoid the matter go to court. The respondent would have none of that. He would make undertakings which he ignored at will. Despite the ease with which the matter could have been resolved, the respondent kept changing his position thereby forcing applicant to seek recourse in the courts.

The respondent was a poor witness for his case. Had he heeded Mr Mahlangu's advice to engage another person to appear for him, he would have saved the little of his

integrity that remained. The respondent is a lawyer with several years of practice behind him. He runs his own law firm and, I assume, supervises professional assistants under his charge. This was not reflected in this case. He behaved like the common and run of the mill lying litigants. Mr *Phillips* had a field day during cross-examination. He could not reconcile his own versions of the events. He ended up admitting that he could be the one lying rather than Mr Mahlangu. From the beginning the respondent did not maintain the ethical behaviour of a legal practitioner towards a fellow practitioner. Had he done so, he would have seen the need to reciprocate the good will shown him by Mr Mahlangu and avoided playing the victim of board-room battles. If, for example, this motor vehicle was a shell as he claims, why then did he take it in the first place since he had his own newer one? In any event. If his possession was lawful as he says why agree to return it to the applicant in the December 2004 conversation with applicant's legal practitioners? His different versions as to whether he had it or not point to only one conclusion which is that he had the motor vehicle unlawfully. I am not persuaded by the claim that his company had lawfully acquired it. Had this been the case then all the more reason why he should have stated his position to be so from the outset. In his own words, he had only to clear the outstanding issue of proving that he had paid for it. He failed to do this in the board-room, to Mr Mahlangu and the day he appeared in court. His claim that there was an admission that there had been payment cannot be believed. Mubaiwa demonstrated that the person had released the motor vehicle on the assumption that there had been payment at Head Office in Harare. There was no such payment. The respondent, being a senior legal practitioner, knows how to prove issues in dispute.

It is trite that in a vindicatory action, the plaintiff must prove that he is the owner of a clearly defined asset and that the defendant was in possession of it at the commencement of the action. The defendant then has the onus of proving a right of retention. To succeed, the plaintiff must prove that he is the owner of the property and that the defendant took possession of it but disposed of it before the action. See *Jolly* v *A Shannon and Anor* 1998 (1) ZLR 78 (HC). The principle on which the *actio rei vindicatio* is based is that an owner cannot be deprived of his property against his will and that he is entitled to recover it from any person who retains possession of it without his consent. Once ownership has been proved its continuation is presumed. The onus is on the defendant to prove a right of retention: *Chetty* v *Naidoo* 1974 (3) SA 13 (A) at 20A-C; *Makumborenga* v *Marini* S-130-95.

In the present matter I am satisfied that the applicant has proved its ownership of the motor vehicle in question. On the other hand I am equally satisfied that the respondent failed

to prove his contested claim that he had paid for the motor vehicle or that another entity in which he had interest had paid. The fact therefore remains that as Chairman he had unlawfully used the position to acquire the assets of the company without following proper procedure. The paper trail on the Toyota Hilux only reflected that it was released to the respondent. It betrayed the absence of good cause for the release. His contradicting explanations did not detract from the fact that he had no right to hold on to this motor vehicle without the permission of its owner.

Disposition

The respondent obtained possession of the Toyota Hilux motor vehicle registration number 424-562 E without the applicant's authority or permission.

The respondent promised both orally and in writing to return the said motor vehicle by delivering it to the offices of ZMDC either in Harare or Mhangura.

There was no sale to either the respondent or Hoeramar enterprises. The respondent has the motor vehicle which he continues to unlawfully hold on to.

The applicant is therefore entitled to the order it seeks with costs on a higher scale.

Gill, Godlontons & Gerrans, applicant's legal practitioners
Muskwe & Associates, respondent's legal practitioners