FREIGHT WORLD (PRIVATE) LIMITED
versus
CLAUDE SACHIKONYE

HIGH COURT OF ZIMBABWE
CHIWESHE JP
HARARE, 22 & 25 November and 12 January 2017

Opposed matter

H. Mukonoweshuro, for the applicant
Miss T. Takawira, for the Respondent

CHIWESHE JP: The respondent was employed by the applicant as its Finance Director. On 13 March 2013 he was dismissed from employment after he was found guilty of misconduct. During the course of his employment he had been issued with a vehicle, namely an Isuzu D. Tech twin cab, registration number ABK 6954. This vehicle belongs to the applicant and is so registered in the applicant's name.

Upon dismissal the respondent refused to return the vehicle to the applicant and has remained in possession of the same. The respondent argued that according to company policy the vehicle was now his. The applicant's position is that the vehicle remains its property. It denies the existence of a company policy that would entitle the respondent to ownership of the vehicle.

Initially the dispute was referred to conciliation but the parties failed to reach agreement. It was then referred for compulsory arbitration in terms of the Labour Act [Cap 28.01]. The arbitrator found in favour of the respondent and ordered that the vehicle be sold to the respondent at book value. The applicant appealed to the Labour Court. The Labour Court upheld the arbitrator's decision. The applicant further appealed to the Supreme Court where the appeal was allowed by consent of both parties. The consent order is dated 24 May 2016 and given under case number SC 120/15. It reads; in part

> "IT IS ORDERED BY CONSENT THAT:
> 1……
> 2. The judgment of the court a quo is set aside and substituted with the following :-
> (i) The appeal against the arbitral award succeeds with costs.

(ii) The arbitral award is accordingly set aside.
(iii) The appellant's decision to dismiss the respondent is hereby confirmed."

Despite this clear order the respondent has not returned the vehicle. He insists that he is entitled to it in terms of the applicant's company policy. The policy of the company according to him is that once the applicant issued a vehicle to employees in the grade of director, the vehicle automatically belongs to that employee. In his case he was not just an employee but a shareholder, a fact that further enhances his entitlement to the vehicle.

The applicant has had to file the present application for *rei vindicatio* to recover its motor vehicle. It denies the existence of the kind of motor vehicle policy described by the respondent. At para 17 of its founding affidavit the applicant states as follows:

> "17. The respondent was dismissed from his post with applicant. He has no basis whatsoever of holding and using the applicant's vehicle against its wishes."

It is trite that the action *rei vindicatio* entitles the owner of a thing to recover it from any person in possession of it without the owner's consent. The claim may be rebutted by a person who pleads a right of retention such as a contractual right. See *Joram Nyahora v CFI Holdings (Pvt) Ltd* SC 81/2014 and *Chetty v Naidoo* 1974 (3) SA 13.

The company policy with regards disposal of motor vehicles to senior employees by the applicant has been articulated by Felix Nyaruwaya, the applicant's managing director. It is to the following effect:

When the applicant buys a new vehicle for a senior employee, such employee enjoys a right of first refusal to buy the old vehicle being replaced by the new vehicle. If he chooses to buy the old vehicle, same is then evaluated to establish its market value. The motor vehicle is then sold to the employee at the market value price. The transaction would be authorised in writing and registration transferred to the employee in the usual manner. This is the policy that had been followed in the case of three other directors whose details and those of the vehicles involved are disclosed in the answering affidavit.

The averment by the respondent that a company vehicle bought for the use of an employee in the performance of his duties automatically becomes the property of that employee does not make sense. It is unlikely that any responsible company would implement such a policy with regards an asset of substantial value such as a motor vehicle.

For an employee to demand, as the respondent does, that the vehicle's ownership must or ought to revert to him, he must demonstrate that there is provision in his contract of

employment that entitles him to such ownership, or, alternatively that there is in existence, written or otherwise, a company policy to that effect.

The respondent has not discharged the onus resting upon him in terms of demonstrating a contractual right or any other right to the motor vehicle. He has not meaningfully challenged the nature of the applicant's motor vehicle policy as enunciated by the applicant and applied to successive directors in its employ. In any event, the respondent has not challenged applicant's assertion that the respondent was being taxed for the motor vehicle benefit in terms of s 6 as read with s 8 of the Income Tax act [*Cap 23:06*]. If the vehicle had become his on allocation he would not have been so taxed.

In the Joram Nyahora *case supra*, the Supreme Court stated as follows:

> "It may be mentioned here that in most cases the option granted by the employer to purchase a used company car is privilege accorded to its employees perhaps in the hope that this will induce loyal service as well as a culture of caring for the company property or some other reason beneficial to the employer/company. Therefore unless the contract specifically states so, a court ought to be careful not to read a legal right into a policy matter which is for the discretion of an employer. In my judgment the question of a right to purchase could only arise after an offer had been made to and accepted by the employee to purchase the vehicle and not before."

In other words a policy on its own does not give rise to a legal right to purchase. There must be an offer and an acceptance. In the present case there is no such offer and acceptance. The matter must end there.

In any event it is seldom that employers award such benefits when the cause of exit is one shrouded with misconduct on the part of the employee concerned. Materially the applicant states at para 9 and 10 of the founding affidavit as follows:

> "9. The respondent was appointed a director on the 28th day of July 2010 and thereafter allocated the vehicle which is the subject matter of this application to use to discharge his duties. …….
>
> 10. He was dismissed from his post by the applicant in February 2013, less than 3 years after his appointment. At the time of his dismissal applicant had not issued him with a vehicle to replace the one he was issued with on appointment to the board of directors. The right of first refusal had not accrued to him at the time his contract was terminated."

The above is a lucid and logical narration of the relationship between the parties at termination. I am satisfied that the requirements for the *rei vindicatio* have been met. The application must succeed.

It is ordered as follows:

1. That the respondent be and is hereby ordered to surrender possession of and to return to applicant the motor vehicle namely Isuzu registration number ABK 6954 upon service of this order, failing which the Sheriff be and is hereby authorised to take all and any steps as may be necessary to recover the said motor vehicle from the respondent or any person whomsoever is in possession thereof on the authority of the respondent and return it to the applicant.

2. That the respondent shall pay costs of suit.

H. Mukonoweshuro & Partners, applicant's legal practitioners
Hungwe & Partners, respondent's legal practitioners