CATCHWAY INVESTMENTS (PVT) LTD
v
KURDISH DISTRIBUTORS

HIGH COURT OF ZIMBABWE
TSANGA J
Harare, 3 April & 9 September 2024

Civil Motion (Court Application)

NF Kambarami for applicant
Respondent in default

TSANGA J:

The applicant, which owns a garage and is in the business of mechanical repairs to mechanical faults on motor vehicles of its customers, seeks a declaratur that it is entitled to storage costs for safekeeping the respondent's motor vehicle, a Nissan Caravan, Silver in colour with registration number AB11663, Chassis No.CWGE25-000966, Engine No.ZD30 DD.

According to the applicant's sworn affidavit, through its representative Mr Martin Njela, the vehicle was brought to its garage situated at 17047 Calton Rd, Graniteside, Harare, on the 20th of May 2011. This was for an engine failure to be attended to. In a verbal agreement with the respondent's representative, Mr Tarwirei Munobvanei, the respondent would acquire and provide any spares requested by the applicant after diagnostics, within a reasonable time and not later than three months to enable the applicant to carry out repairs on the motor vehicle. Applicant says it was further agreed between them that the respondent would incur storage costs at a rate of USD5.00 per day in the event that it failed either to remove its vehicle after completion of repairs or to remove its vehicle after it failed to provide spares within the period agreed upon by the parties. Additionally, applicant avers that the parties also agreed that the applicant would keep the motor vehicle in its possession as security/lien for the payment of either the agreed repair costs and or storage costs for the motor vehicle.

The respondent is said to have been advised on the 20th May 2011 of the nature of faults attended on to the vehicle and the parts which needed to be replaced as well as the cost of labour. A quotation for USD1535.00, which included USD250.00 for labour and stripping the engine, and given to the respondent, was attached as an annexure. A period of three months lapsed without the respondents providing the necessary spares required and numerous efforts to have them collect the vehicle from the applicant's garage are said to have been futile. No evidence however was attached of the nature of these efforts. Also attached as an annexure was a tax invoice for the sum of USD 18 400.00 for storage from 2011. It was generated on the 10th of January 2024. The actual amount for storage was USD18 250.00 and the additional USD150.00 was for stripping the engine.

However, the applicant seeks recovery of storage costs at the rate of USD5.00 per day for the last three years only to the tune of USD5 475.00 out of a total of USD18 250.00 which it had calculated for the storage costs for the past 12 years. Applicant also seeks an order directing the respondent to remove its motor vehicle from its garage upon payment of the storage fees. It further seeks that the vehicle be declared especially executable.

The certificate of service shows that the application for a declaratur was served by affixing it on the outer principal door at the respondent's premises at stand 450 Murewa, on the 15th of March 2024. The respondent did not file a notice of opposition and therefore this application for a declaratur was placed on the unopposed roll.

I requested the applicant's counsel to file heads of argument because from a reading of the averments in the affidavit the applicant of its own accord was very clearly alive to the issue of prescription by claiming storage only for the last three years.

At the core of the applicant's heads of argument is that prescription, if it had been raised by the respondent, would only amount to the portion of the storage costs which are older than three years. It was also submitted that the agreement is a *longus tempus* one and therefore storage costs continue to run until the respondent has paid. The applicant says having filed its application on the 11th of March 2024, its claim is for storage costs which the respondent has been incurring for the past three years. The cause of action is said to have arisen on the 11th of March 2021, meaning that the claim had not prescribed at the time the application for the declaratur was filed. The applicant also highlights that prescription cannot be raised *mero motu* by the court as is articulated in s 20 of the Prescription Act [*Chapter* 8:11]

The application, being one for a declaratory order, must satisfy the requirements which were laid out in *Johnson* v *AFC* 1995 (1) ZLR 65 (S) as follows:

> "The condition precedent to the grant of a declaratory order under s 14 of the High Court of Zimbabwe Act 1981 is that the applicant must be an "interested person", in the sense of having a direct and substantial interest in the subject matter of the suit which could be prejudicially affected by the judgment of the court. The interest must concern an existing, future or contingent right. The court will not decide abstract, academic or hypothetical questions unrelated thereto….
> At the second stage of the enquiry, the court is obliged to decide whether the case before it is a proper one for the exercise of its discretion under s 14 of the Act. It must take account of all the circumstances of the matter."

The applicant is most certainly an interested party with a direct claim and the matter is not academic. The issue is whether under the circumstances of the matter, it is a proper one for the exercise of the court's discretion in granting the declaratur as prayed for.

I am mindful of the fact that the onus would be on the respondent to establish whether the applicant aggravated his circumstances in any way. In *Cargo Carriers (Pvt) Ltd* v *Nettlefold & Anor*1991 (2) ZLR 139 (SC), the court cited with approval the following paragraph from *The Solhult* [1983] 1 Lloyd's Rep 605 (CA) at 608 where it was stated by SIR JOHN DONALDSON MR that:

> "A plaintiff is under no duty to mitigate his loss, despite the habitual use by lawyers of the phrase 'duty to mitigate'. He is completely free to act as he judges to be in his best interests. On the other hand, a defendant is not liable for all loss suffered by the plaintiff in consequences of his so acting. A defendant is only liable for such part of the plaintiff's loss as is properly…caused by the defendant's breach of duty".

McNALLY JA, then went on to say at 142 F - 143 A -

> "Roman-Dutch authority is to the same effect: See generally Corbett and Buchanan *the Quantum and Damages in Bodily and Fatal Injury Cases*2 ed at p 10 para 8. There the point is made (relying on *Halsbury*) that there is a further duty on a plaintiff not to aggravate his damages by his own wanton or careless conduct: 'If he does so aggravate his loss, then he will not be entitled to recover damages in respect of the damage attributable to such conduct on his part. **Again the *onus* of establishing such aggravation lies upon the defendant'**.

The failure to file any opposition by the respondent effectively means that it cannot be established whether the applicant aggravated his circumstances in any way in incurring the storage charges over the claimed period. Being that as it may, what is glaring in this application is that the applicant did not attach any correspondence between the parties that confirms that indeed the respondent was asked to pay following the lapse of the time period that the applicant speaks about. It would have helped the court to make an informed decision. The applicant merely claims that it

did so numerous times but attaches not a single piece of evidence that relates to their correspondence on payment of the storage charges and removal of the vehicle. How applicant communicated on the amount owed remains a mystery. In this age of cell phones, emails, and WhatsApp messages it is unclear why there is no evidence regarding demand of the removal of the vehicle and the amount owing. It is the duty of an applicant to place full facts before the court including those that may be adverse to its case.

I do not think that this court is in a position to order that the applicant is entitled to storage costs over the last three years, for the amount claimed being USD5 475.00 in the absence of the evidence being attached that I have alluded to as to the demands made. However, I do think that it would be proper to order the respondent to remove the vehicle and to pay storage costs from the time of this application. In the absence of any evidence from the defendant to show the claim at USD $5.00.00 a day as storage charges is unreasonable, I will accept that the rate be used.
Accordingly the following order is granted as amended

1. The application for a declaratur be and is hereby granted.

2. It is hereby declared that the Applicant is entitled to storage costs for the safekeeping of the Respondent's motor vehicle, a Nissan Caravan, Silver in Colour with registration numbers AB11663, and Chassis No. CWGE25-000966, Engine No.ZD30(DD) at its garage situate at No. 17047 Calton Rd, Graniteside, Harare at the rate of USD5.00 a day calculated from the date of filing this application to the date of this order.

3. That the Respondent be and is hereby directed to remove its motor vehicle referred to above from the Applicant’s garage upon payment of storage costs as calculated in paragraph 2 above within 7 days of this order.

4. That in the event that the Respondent fails to pay and to remove its motor vehicle referred to above within 7 days of this order the Respondent’s motor vehicle, being a Nissan Caravan, Silver in Colour with registration numbers AB11663, and Chassis No. CWGE25-000966, Engine No.ZD30 (DD) be and is hereby declared especially executable for the recovery of the Applicant’s storage costs.

5. The Respondent shall pay costs of suit.

LT Muringani Law Practice: Applicant’s Legal Practitioner