GOMBE HOLDINGS
and
KUCHI CONSTRUCTION (PRIVATE) LIMITED
versus
JOSEPHY CHITOMBO
and
CLEVER MATIGIMU
and
DOUGLAS GWASIRA
and
THE SHERIFF OF THE HIGH COURT N.O.

HIGH COURT OF ZIMBABWE
MUSITHU J
HARARE, 24 September and 8 October 2021

Urgent Chamber Application- Preservation Order

V. Chivore for the Applicants
R. Kadani for the 1st, 2nd and 3rd Respondents

MUSITHU J:

Background

The applicants are related entities. The second applicant is a subsidiary of the first applicant. It falls under the management of the first applicant. The first applicant was the first and second respondents' employer. The first respondent was the Human Resources Manager. The second respondent was the Chief Executive Officer. The third respondent was the second applicant's managing director. As part of their employment packages, the respondents were issued with vehicles for use in the execution of their duties. The employment relationship was severed for various reasons stated in the notification letters dated: 9 September 2020 (for the first respondent), 9 September 2020 (for the second respondent) and 1 September 2020 (for the third respondent).[1]

[1] Pages 17-21 of the notice of opposition

Following the termination of their employment contracts, the respondents were requested to surrender the company issued vehicles. They declined. The applicants instituted separate *rei vindicatio* actions against the respondents for the return of the motor vehicles. Such proceedings are pending before this Court. On their part, the respondents countered by filing applications for *declaraturs* against the applicants. They challenged the termination of their employment contracts. Those applications were withdrawn just before the dates of hearing. On 20 September 2021, the applicants approached this Court on an urgent basis seeking relief set out in the draft provisional order as follows:

"TERMS OF THE FINAL ORDER SOUGHT
That you show cause to this Honourable Court, why a final order should not be made in the following terms:

a) The interim relief granted is hereby confirmed.
b) 1st to 3rd Respondents to pay any storage or other related costs which the 4th Respondents has incurred in execution and enforcing this Order in full.
c) 1st to 3rd Respondent to pay costs of suit on a legal practitioner and client scale.

INTERIM RELIEF SOUGHT

That pending the final determination of this application, an interim interdict is hereby granted against the Respondent as follows

a) 1st Respondent ordered to deliver forthwith to the 4th Respondent for safe custody keeping, the Toyota Aventis motor vehicle, Registration Number AFF 7889 within 24 hours of being served with the order, until the determination to finality of proceedings filed under case no HC824/21.
b) 2nd Respondent ordered to deliver forthwith to the 4th Respondent for safe custody keeping, the Toyota Land cruiser motor vehicle, Registration Number AEI 1362 within 24 hours of being served with the order, until the determination to finality of proceedings filed under case no HC822/21.
c) 3rd Respondent ordered to deliver forthwith to the 4th Respondent for safe custody keeping, the Toyota Hilux motor vehicle, Registration Number AFA 7889 within 24 hours of being served with the order, until the determination to finality of proceedings filed under case no HC4856/21.
d) The 4th Respondent is authorised to enlist the services of the ZRP should any need arise."

The respondents opposed the application.

The Applicants' Case

The applicants contend that the effect of the withdrawal of the *declaraturs* meant that the respondents had no cognisable claim at law in respect of those vehicles. That notwithstanding, the respondents had refused to surrender the vehicles. It is the withdrawal of the respondents' claims that gave rise to this current application. The applicants harboured a reasonable apprehension that the continued use of the employer issued vehicles by the respondents would result in their depreciation value, while the applicants derived no benefit from such continued use. There was also a real likelihood that the vehicles would be vandalised

just to ensure that the applicants derived no real benefit upon their eventual surrender. For that reason, the applicants wanted the vehicles surrendered to the fourth respondent or other neutral party so that the perceived harm was arrested before further damage was occasioned. Their values needed to be preserved by placing them under the custody of the third party pending the determination of the applicants' *rei vindicatio*. According to the applicants, the balance of convenience clearly favoured the granting of the relief sought.

As regards urgency, the applicants averred that the need to act arose around 14-15 September 2021 when the applications for *declaraturs* were withdrawn by the respondents. The applicants contend that they could not have approached the court earlier as the employment status of the respondents remained unresolved owing to the pending *declaraturs*. The withdrawal of the *declaraturs* all but put paid to their claims that were founded on the alleged unlawful termination of their employment contracts. That the need to act arose within the said period was even more emboldened by the respondents' refusal to surrender the vehicles notwithstanding the withdrawal of their cases against the applicants. Those claims had been made out of malice, specifically to buy time and to allow them continued use of the vehicles.

The Respondents' Case

In response, the respondents raised three preliminary points namely, lack of urgency, absence of a cause of action and *lis pendens*. On urgency, the respondents contended that the need to act did not arise between 14 and 15 September 2021, as alleged by the applicants. As against the first respondent, it was averred that the need to act arose in March 2021 when the first applicant instituted the *rei vindicatio* under HC 824/21. As against the second respondent, the need to act arose in April 2021, when the second applicant also instituted its *rei vindicatio* claim against that party under HC822/21. The *rei vindicatio* action against the third respondent was only instituted in September 2021 under HC4856/21. The respondents' contention is that this application ought to have been made concurrently with the *rei vindicatio* claims. The applicants therefore sat on their laurels and only decided to approach the court five months later. The matter could not be treated as urgent at all.

Regarding the second preliminary point on the absence of a cause action, the respondents averred that the applicants failed to establish a *prima facie* right of ownership in the motor vehicles. Nothing was placed before the Court to evidence the applicants' ownership of the vehicles in question. All they did was to make unsubstantiated claims to assert that right. For instance, annexures B and C to the applicants' founding affidavit actually showed that one

of the vehicles was purchased in first respondent's name.[2] No agreements of sale or vehicle registration documents bearing the applicants' names were attached to the application to support the ownership claims. It was also submitted that there was no pending vindicatory claim against the third respondent. It therefore meant that there was no cause of action as against the third respondent since a preservation order is founded on pending proceedings for a *rei vindicatio*.

The third preliminary point of *lis pendens* was abandoned by the respondent's counsel after a brief exchange with the Court concerning the correctness of the submission relative to the law and the circumstances of the case.

Regarding the merits, the respondents contended that the applicants had failed to prove that they were the owners of the motor vehicles. Nothing had been placed before the Court to substantiate the ownership claims. On the contrary, the respondents claimed ownership of the vehicles. Consequently, the applicants had no basis to approach the court for a preservation order. The respondents further averred that their applications for *declaraturs* had nothing to do with the ownership of the vehicles. They were only challenging the unlawful termination of their employment contracts. That route was abandoned. The respondents had since directed their complaints to the Ministry of Public Service, Labour and Social Welfare. The Court was urged to dismiss the application with punitive costs.

THE SUBMISSIONS

Urgency

At the onset of the oral submissions, *Mr Kadani* for the respondents submitted that the matter was not urgent. The applicants grounded the need to act on the withdrawal of the *declaraturs* by the respondents on 14 September 2021. *Mr Kadani* argued that the present application ought to have been filed around 19 March 2021 when the applicants instituted the *rei vindicatio* motion against the first respondent. This was followed by the *rei vindicatio* summons action against the second respondent, also instituted on 19 March 2021. It only made legal sense that the preservation order be sought against the property whose ownership was the subject of the *rei vindicatio* proceedings. Urgency in this case was self-created because there was no relationship whatsoever between the withdrawal of the *declaratur* proceedings and the preservation order sought on an urgent basis. This was so considering that the *declaraturs* were

[2] See pages 24-26 of the application

not based on the respondents' entitlement to the motor vehicles. The respondents were only challenging the unlawful termination of their employment contracts.

Mr Chivore on the other hand submitted that the applicants had treated the matter with urgency. He insisted that the need to act arose between 14 and 15 September 2021 when the respondents withdrew the pending claims for *declaraturs*. In those proceedings the respondents were challenging the termination of their contracts of employment. Had the court found in favour of the respondents, then it meant that they remained employees of the applicants and entitled to full enjoyment of their employment benefits that included the motor vehicles. The withdrawal of the matters meant that the respondents had no further claims of rights against the applicants.

The applicants approached this court soon after the respondents withdrew their cases. The approach to this court could not have been done earlier as the respondents were still challenging the termination of their contracts of employment. The continued use and enjoyment of the motor vehicles after the withdrawal of the *declaraturs* gave rise to a reasonable apprehension that the vehicles would be abused as well as further deteriorate in value. The matter therefore craved for urgent attention. The court was referred to the case of *Gwarada v Johnson & Others*[3]

ANALYSIS

Let me begin by quoting GILLEPSIE J's remarks in *Dilwin Investments [Pvt] Ltd v Jopa Enterprises Co Ltd.* The learned Judge stated that:

> "A party who brings proceedings urgently gains considerable advantage over persons whose disputes are being dealt with in the normal course of events. This preferential treatment is only extended where good cause can be shown for treating one litigant differently from most litigants. For instance where, if it is not afforded, the eventual relief will be hollow because of the delay in obtaining it."[4]

It is only where good cause has been shown that a litigant can jump the normal roll to the urgent roll. On the face of it a certificate of urgency must justify the urgency label attached to the application.[5] In *casu*, the certificate of urgency does not address the crucial question of when the need to act arose. It is only in the founding affidavit that it receives attention. Admittedly, the certificate of urgency must be read together with the founding affidavit. It however becomes highly irregular when a legal practitioner certifies a matter as urgent without

[3] 2009 (2) ZLR 159
[4] HH 116/98
[5] See *Condurago Investments (Private) Limited T/A Mbada Diamonds* v *Mutual Finance (Private) Limited* HH 630/15 at page 2

due regard to one of the fundamental considerations that founds urgency, that is, when the need to act arose. In *Mushore v Mbanga*,[6] MAFUSIRE J aptly set out the test for urgency as follows:

> "On urgency, the parties seemed *ad idem* that the court looks at the issue objectively, rather than subjectively. They were *ad idem* that the two paramount considerations were [i] "time" and [ii] "consequences".
> By "time" was meant the need to act promptly where there has been an apprehension of harm. One cannot wait for the day of reckoning to arrive before one takes action. That was the *dicta* in *Kuvarega* v *Registrar-General & Anor*[7]which has stood the test of time and has been followed in numerous other cases…….
> By "consequences" was meant the effect of a failure to act promptly when harm is apprehended. It was also meant the effect of, or the consequences that would be suffered if a court declined to hear the matter on an urgent basis. If the prejudice would be irreplaceable, then the matter should be deemed urgent. Put another way, if the remedy that the court could eventually grant, possibly in ordinary motion proceedings, would effectively be a *brutum fulmen* because it was too late, then the matter could be urgent" (Underlining for emphasis).

The twin concepts of 'time' and 'consequences' invariably help the court in ascertaining whether on a consideration of the facts and the circumstances of the case, a matter should be treated as urgent. Mr *Chivore's* argument that the need to act was triggered by the withdrawal of the *declaraturs* is somewhat unconvincing. He went on to submit that the cause of action was occasioned by the withdrawal of the *declaraturs,* which were expected to dispose of the employment dispute conclusively. I find that submission rather implausible and hard to believe. The relief sought by the applicant is intended at securing the vehicles pending the resolution of the *rei vendicatio* claims. The *rei vindicatio* proceedings were provoked by the respondents' refusal to surrender the vehicles following the termination of their employment contracts sometime in September 2020.

Proceedings to recover the vehicles were only instituted in March 2021 (for the first and second respondents), and September 2021 (for the third respondent). By that time it must have been clear to the applicants that the respondents lay no claim to the vehicles following the termination of their contracts of employment. Those vehicles were issued to the respondents in terms of their contracts of employment anyway.

Mr *Kadani* submitted that the respondents' *declaraturs* were only issued and filed before this court sometime in June 2021. On that score, he argued that between March and June 2021 there was nothing stopping the applicants from filing the present application because at that stage the respondents had not challenged the termination of their contracts of employment. That again showed that the applicants sat on their laurels so to speak. I find that submission

[6] HH 381/16
[7] 1988 [1] ZLR 188 [H]

persuasive. If the applicants' argument is that the need to act was triggered by the withdrawal of the *declaraturs* which had only been filed in June 2021, what stopped the applicants from taking action in the period between March 2021 and June 2021 before the *declaraturs* were instituted? Mr *Chivore* sought to downplay the inaction attributing it to the closure of the courts as a result of the COVID 19 induced national lockdown. That argument is self-defeating. The *rei vindicatio* claims were instituted during the same COVID 19 era. As for urgent matters, special arrangements were made to allow for the issuing and filing of such matters as well as their disposal.

Mr *Kadani* raised another crucial point which Mr *Chivore* was at pains to refute conclusively. The *declaraturs* filed by the respondents were simply challenging the termination of their employment contracts. They had nothing to do with the vehicles. The applicants would not have waited for the resolution of a dispute that had no bearing on the vehicles. I agree with that submission. The applicants did not have to wait long to seek a preservation order once they had terminated the respondents' contracts of employment. If the vehicles belonged to them, as they claim, all they had to do was to institute the *rei vindicatio* simultaneously with the present application. I am fortified in holding this position by the words of MATHONSI J (as he then was) in *Montclaire Hotel & Casino v Farai Mukuhwa.*[8]He said:

> "The action *rei vindicatio* is available to an owner of property who seeks to recover it from a person 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. …….
>
> This is what the applicant has done in this matter. It is the owner of the property which was given to the respondent by virtue of an employment contract which has now come to an end. Whether the respondent is challenging the termination or not is immaterial, an owner is entitled to vindicate……" (Underlining for emphasis)

The applicants did not have to wait for the resolution of the *declaraturs* to seek a preservation order. The cause of action was not occasioned by the withdrawal of the declaraturs as opined by Mr *Chivore*. It was the refusal by the respondents to surrender the vehicles on termination of their employment contracts that set in motion the chain of events that ensued. At any rate, what the applicants seek through the present application is the preservation of the vehicles at some neutral place pending the determination of the *rei vindicatio*. Such relief

[8] HH 501/15 at page 3

would surely not have defeated the respondents' cause even assuming the same vehicles were the subject of the *declaraturs*. The applicant is not asking that the vehicles be surrendered to it. It merely wants them preserved. There was no need to wait for the conclusion of the *declaraturs*.

In the final analysis, it is the court's finding that this is a classical case where the applicants demonstrably set on their laurels and only realised with the benefit of hindsight that the respondents would still remain in possession of the vehicles even after the withdrawal of their *declaraturs*. This court is satisfied that the applicants did not act when the need to do so arose. The application falls on that basis alone. Having made the finding that the application lacks urgency, it becomes unnecessary to address the remaining preliminary point and the merits of the matter.

COSTS

The general rule is that costs follow the event. I see no reason to depart from this norm. The respondents sought the dismissal of the application with costs on the attorney and client scale. Nothing was placed before the Court that warrants an award of costs on the punitive scale.

DISPOSITION

Accordingly, it is ordered that;

1. The application is not urgent and is hereby struck off the roll of urgent matters.
2. The applicants shall bear the respondents' costs of suit.

Chivore Dzingirai, applicants' legal practitioners
Atherstone & Cook, 1st, 2nd and 3rd respondents' legal practitioners