

CROCO HOLDINGS (PRIVATE) LTD
versus
KUDZAYI MUNDANGEPFUPFU

HIGH COURT OF ZIMBABWE
BACHI-MZAWAZI J
HARARE, 22 September & 19 October 2022

Opposed Application

T Chogudumba, for the applicant
MN Nyenya, for the respondent

BACHI-MZAWAZI J: The applicant, a duly registered company has approached this court seeking a compelling order, ordering the respondent to deliver their courtesy vehicle a Ford Ranger, T6, Single Cab, Registration Number, AFN 0119, within 7 days of the date of service upon her of the order. The application is opposed with respondent mounting a counterclaim apportioning liability to the resultant damages to her vehicle as allegedly having been caused by the negligence on the applicant.

Notably, this is a classic example of how a seemingly simple inattentive mistake at a fuel pump can be costly. The common cause facts are that, sometime in April 2022, the respondent's petrol vehicle, a Mercedes Benz, was mistakenly refuelled with diesel instead of fuel at the respondent's garage. Apparently, the parties' versions as to who was driving the car, what action was taken soon after the mix up and at later stages are at variance. The parties also disagree on the extent of the damages caused by the pouring of diesel in a petrol tank and those that manifested soon after the repairs made by the applicant's mechanics. There is an ultimate report from a reputable garage, and dealer in Mercedes Benz which is also being challenged as inconclusive. What is not in dispute, is that, the parties engaged each other during the whole episode, resulting in applicant offering the respondent a replacement courtesy vehicle, to use whilst hers was being attended to by the applicant's garage workshop mechanics. It is also on record that the vehicle to date is still not functioning and in the possession of the applicant. There is a stalemate as to who caused the damages that manifested during the course of and after the repairs made by the applicant. There are also reports from mechanics stating the change and replacement of certain specified original components of the Mercedes Benz vehicle with those of a different make. Both parties are denying knowledge of and any role in the

exchange. The bottom line is that the applicant encountered challenges in fixing the vehicle but wants its replacement vehicle returned upon the collection of the malfunctioning one by the respondent. The respondent up until the time of the current application has refused to release the vehicle on the basis that it has not finished its intended purpose as her own vehicle has neither been fixed nor restored to its original condition before the fuel mix up incident. This tug of war, has prompted this application as earlier on indicated.

It is the applicant's case, as borne in their founding affidavit para 5 to 6 that, the respondent, on the 25th of April 2022, drove her petrol vehicle to the diesel pump resulting in the fuelling with the wrong fuel. They argue that soon after the mistake was noticed the petrol attendant with the consultation with the garage workshop mechanic pushed the vehicle into their workshop. It is further, submitted that the fuel tank was removed, attended to and the vehicle was handed over to the owner who drove it away only to come back later the same day claiming that it was malfunctioning. The applicant claims that they then offered the respondent a replacement courtesy vehicle to use whilst hers was receiving further attention. They claim that the misfiring of the starter and some new engine problems diagnosed were not as a result of a fuel mix-up but mechanically discovered inherent defects of the Mercedes Benz which had components not synonymous with Mercedes Benzes. The diagnostic report is embodied in the ZIMOCO report filed of record. Their argument is that they did not tamper with any parts of the vehicle but the manifesting faults emanate from a deeper source unrelated to the act of refuelling a petrol car with diesel.

In opposition, the respondent raised two *points in limine*, one in her written submissions and heads of argument and the other, in the form of a point of law during the course of the hearing. The first preliminary objection is that, the matter is fraught with material disputes of facts that cannot be resolved on the papers before the court. The second point is that of *brutum fulmen*.

On the first point *in limine* the respondent submits that the version of the parties, as to what happened from the onset to the time of this application are incongruous. Firstly, she asserts that, it was not the respondent driving her vehicle on the day of the incident but her brother. She states that she is a regular customer of the applicant but on the day in question her brother was directed to a wrong pump resulting in the refuelling with the wrong fuel. She further points out that soon after the fuel mix-up her vehicle reportedly developed ignition and misfiring problems evidenced by the numerous cranking of the starter by the applicant's garage mechanic.

She also relates that the vehicle only travelled a very short distance before stopping completely. In addition, she referred to a copy of a photograph of plugs sent by the applicants, which need an explanation as to why they had to be changed. She argued further, that there are a lot of questions that can only be answered *viva voce* by mechanical experts in general and the ZIMOCO expert, in particular, who compiled the diagnostic report. She submits that even though the report is there it needs an explanation from an expert who can be cross examined on its contents and other aspects of the resultant damages to her once moving vehicle.

On the second objection, she informed the court that there were recent developments that took place after the commencement of these proceedings. She highlighted that the subject matter central to the cause of action in this matter was no longer in her possession. She states that the applicant had initiated a parallel criminal action resulting in the retrieval of the replacement vehicle from the respondent to the police. She indicated that there is nothing else to deliver or to be delivered, as such, the application is *brutum fulmen*. The cause of action ceases to exist, therefore, the applicant's application should fail on that point of law.

Applicant counteracted that there are no material disputes of facts that cannot be resolved on the papers. They argue that the ZIMOCO report is all inclusive and speaks to all the questions raised. They state that the issue of whether or not the applicants caused the damage to the vehicle is not a factual issue. Counsel for the applicant submits that the only issue to be determined revolves around the interpretation of the reports filed of record. That being so, the conclusion can be drawn from the papers. As such, there is no need for oral evidence. In that regard, they urge the court to apply the *Plascons Evans* rule and decide the matter on the papers as there are no material disputes of fact that need oral evidence. They relied on the cases of *Supa Plant Investment (Pvt) Ltd v Chidavaenzi* 2009, ZLR, 132 at 136F G, *Muzanhenamo v Officer In Charge CID, Law and Order & Ors* CCZ 3/13, amongst others.

On the second preliminary point, the applicants admit that vehicle in issue is now with the police following a criminal report they made against the respondent. They further concede that there is nothing left to deliver or to seek delivery of. However, they state that the criminal matter is an ongoing process therefore this court must hear and determine the matter in their favour.

In my considered view, as regards the first point *in limine*, without going into detail, just at a glance there are so many technical details and questions that need further interrogation from and explanations by those endowed with the expertise in the field of motor vehicles,

mechanics and other related fields. For instance, there is need for detailed explanations on the effect of pouring diesel fuel in a petrol car. What instant remedial action is to be taken in that scenario and was it taken? What are the likely damages, if the wrong procedure is done at the onset of the problem? What could be the cause of the current faults? Are they latent or patent defects, and so on? However, I need not make a ruling on this point as I am of the view that the point of law is sufficient to dispose this matter. See, *Telecel Zimbabwe (Pvt) Ltd v Portraz & Ors* HH 446/15.

On that note, the point of law converted to a preliminary point is that, of *brutum fulmen*. *Brutum fulmen*, simply means an ineffectual judgment. In essence, courts are reluctant to, or are loathe to the issuing or granting of ineffective judgments. In *Madyavanhu v Cairns Foods Ltd* HH 298/21, it was remarked that:

“Courts do not grant orders for enforcement of judgment that are *brutum fulmen*.” See *Erica Ndewere v President of Zimbabwe and Ors* SC57/22 at para 50.

In the cases of, *Chaza v Chawareba & Anor* SC 2/18; *ZIMASCO Private Limited v Marikano* SC 130/11, it was noted that a question of law can be raised at any time in the course of proceedings. Since, it is not in dispute that the source of contention in this application, the courtesy vehicle, is no longer, in the possession or custody of the respondent, then clearly an order compelling her to deliver that which she no longer has will be ineffectual and redundant. It has been superseded by events and will serve no purpose. Applicant’s vehicle is now in possession of the police making the relief sought *brutum fulmen*.

As a result, applicants cannot have their cake and eat it. They consciously elected to pursue a parallel suit, wherein they instructed the police to retrieve the motor vehicle in question, from the respondent, via the criminal proceedings route thereby making the relief sought *brutum fulmen*.

Accordingly, the application is dismissed on that ground with costs.

Atherstone & Cook, applicant’s legal practitioners
Matsika Legal Practitioners, respondent’s legal practitioners