

PRISCILLA MISIHAIRAMBWI
versus
TENDAI CHAPONDA

HIGH COURT OF ZIMBABWE
MUNANGATI-MANONGWA J
HARARE, 28, 29 May 2019 and 31 July 2019

Trial

B. T Kazembe, for the plaintiff

M Ndlovu, for the defendant

MUNANGATI-MANONGWA J: The plaintiff herein issued summons against the defendant claiming the following relief: an order compelling the defendant to return, release and restore possession of a Jeep Cherokee Registration No. ACF 3998 to plaintiff within twenty four hours of the service of the order on him; payment of US\$120.00 per day being holding over damages calculated from the date of release of the motor vehicle, and costs of suit. The defendant contests the claim.

Issues for determination by this court are:

- (i) what was agreed as the cost of repairing the motor vehicle;
- (ii) whether the defendant has been paid the agreed amount;
- (iii) whether the defendant is entitled to hold on to the plaintiff's motor vehicle;
- (iv) whether the plaintiff is entitled to recover holding over damages and if so, quantum thereof
- (v) in the event that the defendant is not able to return the motor vehicle what is the reasonable value the plaintiff is entitled to recover.

The following facts are common cause: The plaintiff's motor vehicle was involved in an accident which necessitated repairs. The engine was not damaged except the fuse box. Repairs were for the body. The plaintiff and defendant entered into an oral agreement for the repair of the motor vehicle. Payment was to be in instalments and the plaintiff was to foot the cost of spares. When the repairs were effected, plaintiff sought to collect her motor vehicle but defendant refused to release the same on the basis that plaintiff had not paid her dues in full and US\$17 000.00 was outstanding. At that juncture the parties haggled over what the cost of repairs had been agreed to be.

The plaintiff in her summons claims the parties agreed on payment for repairs at a total cost of US\$8 000.00. She paid the full amount hence is entitled to her vehicle which defendant is holding unlawfully. The defendant in his plea of 30 April 2018 denies that repairs were agreed at \$8 000.00 and insists he is not legally obliged to release plaintiff's vehicle until she pays the total agreed figure of US\$22 000. He alleges that the plaintiff paid a deposit of between US\$5 000 and US\$6 000.00. The defendant did not counter-claim for the balance.

The plaintiff gave evidence to the effect that she was introduced to the defendant by a fellow member of Parliament a Mr Chimbaira. An oral agreement for the repairs of the motor vehicle was entered into wherein parties agreed on payment of US\$8000.00 for repairs and she would pay for spares. Her evidence was that she paid through eco-cash and cash delivered to defendant by her driver. The defendant would indicate the amounts required for spares and she duly paid except for a battery which she sent her driver to purchase and it was physically delivered. She emphasised that the relationship was based on trust, she never got a receipt for all payments made. It is the defendant who phoned to advise that the motor vehicle was ready for collection and she sent her driver to collect. Upon collecting the motor vehicle the driver was told it could not be collected as there were outstanding monies. The driver called her to advise of the development. She became angry and sought means to get her car back but the police advised her to follow due legal process hence the action.

Under cross-examination she maintained that she had not sought any quotations prior to visiting the defendant. The defendant sought to say she had been quoted \$45 000.00 and US\$55 000.00 for the repairs. She indicated that the value of the car when bought was \$35 000.00 and

when damaged it was valued at \$22 000.00 so it would be ridiculous to have repairs cost more than the value of the car.

She further claims \$120.00 *per* day which she alleges arose out of the inconvenience she experienced when she had no car and defendant was holding to her car. In arriving at the figure she had considered the cost of getting alternative transport, and the wear and tear to the motor vehicle which had been in the sun. She stated that using a taxi in Harare alone from home to Parliament would cost her US\$30.00 a day and \$80.00 to go to Bulawayo where her constituency is. She also stated that it was her belief that the defendant was using the car as he was refusing to release the motor vehicle. The plaintiff testified well and was not shaken under cross-examination and appeared to be a truthful witness who conceded that she does not know much about cars but relied on the men involved in this case for guidance.

The plaintiff called her driver as her witness one Mr Fungai Nyakawa. This witness' evidence was brief and to the point. He confirmed knowing the defendant as he would be sent by plaintiff to deliver cash stashed in envelopes. The money was either for repairs or spares although he would not know the amount enclosed. He never got receipts for cash delivered. He confirmed buying a battery and delivering it to the defendant. He further clarified the mileage of the vehicle as being below 100 000 km particularly in the region of around 73 000 to 74 000 km. The witness particularly knew the damages to the motor vehicles. He was an excellent witness who turned out to be honest and made it clear he was not privy to the terms of the agreement of the parties, his role being that of a driver.

The defendant Tendai Chaponda gave evidence that plaintiff came with her workmate to his premises seeking repairs of the motor vehicle. They had been to other garages where quotations of between \$40 000 and \$55 000.00 were charged. The motor vehicle had been damaged mostly on the right side. He charged US\$ 22 000.00 for the repairs. She later paid a deposit of US\$2 000.00 when defendant took the motor vehicle for repairs. The plaintiff would pay through ecocash. He stated that he was in total paid US\$5 000.00 and a balance of US\$17 000.00 remains outstanding. It was his evidence that before repairs the motor vehicle was valued at US\$10 000.00 and after repairs it had a value of US\$45 000 in April 2015. He estimated the motor vehicle's current value as between US\$28 000 and US\$30 000.00.

On the claim for \$120.00 damages per day the defendant denied using the plaintiff's motor vehicle and that plaintiff is entitled to any damages for holding over the motor vehicle. He averred that instead plaintiff should be paying for storage charges as he has had to keep the motor vehicle at his workshop and he had to look for security to safeguard the vehicle.

During cross examination defendant admitted that he did not issue receipts as the parties had no written agreement, he trusted plaintiff as a sister and believed that she was to pay as agreed. He stated that when he had stated in his plea that he had been paid between \$5000.00 and \$6000.00 he had not checked his records. He maintained that he paid for spare parts to the tune of around US\$12 000.00 as the money received was not enough. He had to pay for replacement parts although he had no receipts for that. As for the fuse box it was repaired and not replaced as plaintiff had run out of money. The defendant stated that when he called plaintiff it was not for her to collect the motor vehicle but he was asking for the balance. He then changed and stated that he told the plaintiff to come and collect the motor vehicle and pay the balance.

The defendant later indicated that in fact the cost of parts was between \$14 000 to \$17 000-00. He bought some of the parts from South Africa Jeep Cherokee the dealers in Jeep Cherokee vehicles and some from scrap yards. The defendant did not call any other witness.

The court ordered an inspection *in loco* at the defendant's garage in Chitungwiza. Both parties inspected the motor vehicle and plaintiff confirmed that the motor vehicle had been repaired. The motor vehicle which had no battery had to have a battery installed and the engine was able to run. The court observed that there were other items in the motor vehicle and it was packed among other vehicles. Given the manner it was packed it was clear the vehicle had not been in use for quite some time.

After the inspection *in loco* there has not been any insistence by the plaintiff that she seeks the value of the motor vehicle rather maintaining her claim for *rei vindicatio*.

Before determining whether the plaintiff's claim for *rei vindicatio* can succeed the court has to make a finding on what was agreed to be the cost of repairs and whether the plaintiff paid for the repairs. The parties had an oral agreement. As nothing is in writing the court has to decide who to believe between the parties. Credibility becomes pertinent. The plaintiff maintained that the cost of repairs was agreed at US\$8000 which she paid in full through cash and ecocash. Her

driver supported the delivery of cash to defendant. She claimed she also paid for spare parts as advised by the defendant and supplied a battery.

The defendant claims \$5000-00 was paid. He did not issue receipts. The amount initially indicated in pleadings being \$5000- \$6000-00 shows uncertainty. The defendant claims spares were bought from Jeep Cherokee in South Africa and some in scrap yard and claims they ranged from \$14 000-00 to \$17 000-00. He used his money. Not a single receipt was produced. The defendant changed position viz cost of spares from the initial amount of US\$12 000-00.

That the defendant would utilise his own resources of up to US\$17 000 to buy spares and not keep receipts is highly questionable. Further, the failure to counter-claim for the outstanding amount makes his version less probable. It is the plaintiff's story which carries a reasonable degree of probability. Pictures of her motor vehicle nearly completely repaired were sent to her and in two weeks' time she was called to come and collect her car. The court believes her version that there was no mention of money. This is why she sent her driver to collect the car. The issue of moneys outstanding was only raised upon collection. The plaintiff's reaction was totally understandable, anger and frustration. That is why she sought to use people to get her car and was advised against adopting such a course. It can only be because she knew she had discharged her obligation.

The court thus accepts the plaintiff's version that the costs of repairs was agreed at US\$8 000. Equally the court accepts the plaintiff's version that she paid the amount in full. A finding having been made that plaintiff paid for the repairs in full and discharged her obligations she is entitled to her motor vehicle.

In *Stanbic Finance Zimbabwe v Chivhunga* 1999 (1) ZLR 263 (H) MALABA J (as he then was) explained the principle of *rei vindicatio* as follows:

“The principle on which action *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. The plaintiff in such a case must allege and prove that he is the owner of a clearly identifiable movable or immovable asset and that the defendant was in possession of it at the commencement of the action. 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 13A...”

Having discharged her contractual obligations, the defendant cannot continue to hold the motor vehicle against the plaintiff's wishes to get her motor vehicle back. Plaintiff as the owner is entitled to vindicate her property, defendant has no lawful right to continue to hold the property against

plaintiff's wishes. Conversely the defendant has not established a basis to continue to hold to the motor vehicle. He has no right of retention over the motor vehicle having been paid in full.

However, the plaintiff's evidence for holding over damages is insufficient to convince this court. She claimed that if she were to use a taxi to go to work (which is Parliament) she would require \$30 a day. No proof was tendered to substantiate this. It is not clear how many days she attends parliament. In the same vein she indicated that if she travels to Bulawayo her constituency she would utilize \$80 per trip. The number of trips and how they feed into \$120.00 per day was never clarified. In supporting her claim she also stated that the car has been in the sun for 4 years. There is no evidence tendered to show the extent of damage to the car by being exposed. The extent of damages as related to US\$120.00 per day was not proven. It is not in doubt that the plaintiff suffered inconvenience by not having access to her motor vehicle. However, a claim for damages ought to be substantiated by evidence which in this case is missing. The court cannot therefore grant the order sought for holding over damages.

The vehicle being available and having been duly repaired the plaintiff is entitled to her vehicle. In the result the alternative prayer for payment of the value of the motor vehicle falls away.

Consequently the following order is issued:

1. The defendant shall release and restore possession of a Jeep Cherokee Registration Number ACF 3998 to the Plaintiff upon service of this order on him.
2. The plaintiff's claim for holding over damages at the rate of \$120.00 per day from the date of service of summons to the date of release of the motor vehicle be and is hereby dismissed.
3. The defendant to pay plaintiff's costs of suit.

Tendai Biti Law, applicant's legal practitioners
Messrs Chinyama & Partners, defendant's legal practitioners