

PATRICIA TSITSI MUCHENGWA
versus
MARANGE RESOURCES (PVT) LTD
and
ZIMBABWE CONSOLIDATED DIAMOND COMPANY (PVT) LTD

HIGH COURT OF ZIMBABWE
DUBE J
HARARE, 29 June 2017 and 19 July 2017

Trial

G Mhlanga, for the plaintiff
I Ndudzo, for the defendants

DUBE J: The applicant seeks an order compelling the defendants to comply with the plaintiff's contract of employment and motor vehicle policy and offer her a Toyota Fortuner to purchase.

The first defendant is plaintiff's former employer whilst the second defendant is an amalgamation of diamond mining companies which were carrying out mining operations in the Chiadzwa area of Manicaland and includes the first defendant. The second defendant has taken over the affairs of the first defendant and its board is now responsible for the approvals of disposal of assets and payments.

The brief facts giving rise to this dispute are common cause. The parties have agreed on a stated case which they bring in terms of Order 29 r 199 of the High Court Rules, 1971. The parties agreed on the following facts. The first defendant was an employee of the first defendant from 15 May 2014 and joined the second defendant on lateral transfer from the year 2012. The plaintiff was allocated a Toyota Fortuner vehicle registration number ACU 9960 in line with her contract of employment for her use. In terms of clause 10.3 of the said vehicle policy, an employee who leaves employment after using the vehicle allocated to him for 1.5 years but before the vehicle reaches the prescribed disposal period shall be eligible to purchase the vehicle.

The plaintiff resigned on 31 December 2015. At the material time of her resignation, she had used the vehicle allocated to her for a period of 2 years 10 months but the vehicle had not reached the prescribing period of 3 years. After the resignation of the plaintiff, the first defendant applied to the second defendant's board to accord the plaintiff the right to purchase the vehicle allocated to her. The board declined to sell the vehicle to her and directed her to surrender the vehicle and she complied.

The parties agreed at the pre-trial that conference that in the event the trial court finds that the said vehicle should be sold to the plaintiff, the selling price will be \$19 930.00. At the time of her resignation, the plaintiff was owed \$66 853.94 in arrear salaries. The parties agreed at the pre-trial conference that the plaintiff should be paid \$49 853.94 and the defendants accept liability to pay the said outstanding monies.

The issues referred for determination are;

1. Whether or not clause 10.3 of the motor vehicle policy obliges the defendants to sell the Toyota Fortuner motor vehicle to the plaintiff.
2. If issue 2.1 is in the affirmative, whether or not plaintiff is entitled to damages in the amount claimed should the defendant fail to sell the vehicle.
3. Whether or not the defendant should pay the plaintiff's costs.

This case rests on the meaning and interpretation of the word "eligible" as it appears in clause 10.3 of the motor vehicle policy.

Clause 10 of the motor vehicle policy provides for disposal of company vehicles and reads as follows,

"10 DISPOSAL

10.1 "Three quote system" from evaluators approved by EXCO shall be used to determine the saleable value of the vehicle.....

10.2 An employee in possession of the vehicle to be replaced shall be allowed the "right of first refusal" to purchase the vehicle and the employee shall purchase the vehicle at 20% of the average price obtained under 10.1..

10.3 An employee who leaves employment after using the vehicle for 1.5 years but before the vehicle allocated to him/her reaches the prescribed disposal period of 3 years shall be eligible to purchase the vehicle".

In *Banking Employers Association of Zimbabwe v Zimbabwe Bank and Allied Workers Union* SC 34 – 15 GUVAVA JA when dealing with a dispute over interpretation of a contract stated as follows;

“It never ceases to amaze how parties to an agreement happily append their signatures to an agreement then a few months later fail to agree on the interpretation of their written word and require some other person, in this instance the court, which was not part of the negotiations, to tell them what they meant.”

This has become the norm. Employees and employers invariably absent mindedly, obtuse to the grave realities of the obligations and rights flowing from contracts, affix their signatures onto contracts of employment, sit back and relax until a fallout. This is when they start haggling over the meaning of their contracts. It is the responsibility of the courts in every such case to step in and give the contract its true meaning and effect. In *Union Government v. Vianini Ferro – Concrete Pipes (Pty) Ltd* 1941 AD 43 at 47, the court gave guidelines on the approach to interpreting a contract as follows,

Now, this court has accepted the rule that when a contract has been reduced to writing, the writing is in general, regarded as the exclusive memorial of the transaction and in a suit between the parties no evidence to prove its terms may be given save the document or secondary evidence of its contents, nor may the contents of such document be contradicted, altered, added to or varied by parole evidence.’ See also *Johnson v Leal* 1980 SA 927 (A) @ 943 B, *Mutasa v Telecel International & Anor* HH 331/14

The case of *Institute of Training and Education for Capacity Building v Member of the Executive Council for Education SA*, HC 165/12, deals with how to interpret the meaning of a word in a contract. The court stated as follows,

“The golden rule, to interpreting a document is that in ascertaining the intention of the parties to a contract the words used in it must be given their ordinary grammatical meaning with application of the rules of grammar, dictionary meaning and meaning assigned to them in previous judicial decisions unless such words lack clarity or are incapable of bearing more than one meaning; in which event the evidence of surrounding circumstances / background facts should be considered.” See also *Nyamande and Anor v Zuva Petroleum* SC 45/15

In order to ascertain the grammatical meaning of words, the first port of call is the dictionary. This course may however be possible. In *Loryan (Pvt) Ltd v Solarsh Tea and Coffee (Pvt) Ltd* 1984 (3) SA 834 (W) at 846 G – H the court remarked as follows,

“Dictionary definitions of a particular word are very often of fundamental importance in the judicial interpretation of that word in a statute or in a contract or a will. Nevertheless, the task of interpretation is not always fulfilled by recourse to a dictionary definition, for what must be ascertained is the meaning of that word in its context, in the enactment or contract or other document.”

In the case of (*supra*) the court also stated as follows,

“In order to give a proper interpretation to the intention of the parties, it is incumbent upon the court to examine the whole agreement and not just rely on a single word.”

The golden rule of interpretation otherwise known as the literal rule is the first stage of interpretation in ascertaining the meaning to be accorded to a word used in a statute or contract. The rule entails looking at the words used in crafting the contract and giving them their ordinary grammatical meaning. The objective is to ascertain the mutual intention of the parties . Sometimes the intention is determined solely from the terms of the contract. In this case it is pertinent to look at the dictionary meaning of the words used. Where the language used is clear and definite, the words used are given their ordinary grammatical meaning. Where the intention of the parties is not clear the court may require looking outside the contract. The court need not only look at a single word .Meanings of words change with time and depend on usage at different times and hence the words used may require to be looked at in the context in which the contract was made or the words are used. In that sense, the court is required to examine the whole contract in order to ascertain the real intention of the parties. It is only after the interpretation of the words has been shown to be unclear, absurd or ambiguous, that the court may elect to resort to other cannons of interpretation.

The word ‘eligible’ is defined in the *Merriam Webster* dictionary as follows, “qualified to participate or be chosen, worthy of being chosen, able to receive something”. The *Blacks Dictionary* defines eligible as, “capable of being chosen, the subject of selection, or choice, and also implies competency to hold the office if chosen.” Generally speaking, the word ‘eligible’ when used in its ordinary grammatical meaning speaks to one’s qualification to participate or be chosen or considered. A person who is ‘eligible’ is worthy of being chosen. The fact that one is qualified to receive or purchase a thing does not entail that he has a right or legal entitlement to the thing in question. The person still has to be considered for and a determination made regarding the purchase. The This interpretation is apparent when the meaning of the word ‘eligible’ is examined in the context in which it was used in clause 10.3 and other clauses of the motor vehicle policy.

Disposal of vehicles is dealt with in terms of clause 10 of the motor vehicle policy. The intention of the employer in coming up with clause 10 was to accord its employees a reward and benefit facility in a bid to attract the right people to the company and encourage dedicated

service and probably encourage a culture of caring for company property. Vehicles are disposed in two different scenarios. Clause 10.2 allows an employee who is in possession of a vehicle and is still in service to purchase the vehicle where he has driven it for 3 years and it is being replaced. Clause 10.2 allows the employee the “right of first refusal” to purchase the vehicle. The language used in clause 10.2 gives an entitlement to the employee to purchase the vehicle. This is clear from the command in the clause. The use of the words, ‘shall be allowed the right of first refusal to purchase the vehicle, creates an obligation on the part of the employer to sell the vehicle to a willing employee. The words create a corresponding right on the employee to either refuse to buy the vehicle or purchase the vehicle on terms prescribed. Once the employee has driven the vehicle for 3 years, the employee may not be refused the right to purchase the vehicle in terms of clause 10.2. The clause conveys a right to the employee. The intention in crafting clause 10.2 was to confer a right to the employee which is not subject of any discretion of the employer. Clause 10.2 gives the employee the right to purchase the vehicle and creates a corresponding obligation on the employer to sell the vehicle to employee.

Clause 10.3 applies to an employee who leaves employment after using the vehicle for 1.5 years but before the vehicle allocated to him/her reaches the prescribed disposal period of 3 years. Clause 10.3 is worded differently from clause 10.2. The clauses are worded differently because the circumstances of the employees are different.

An employee who has resigned has to qualify to purchase a vehicle he was using in terms of clause. Certain pre-conditions have to be met for the person to qualify to purchase the vehicle. He has to have driven the vehicle for at least 1 ½ years. The employee does not automatically become entitled to buy the vehicle like the employee under Clause 10.2 even after qualification. The drafters of the motor vehicle policy deliberately used the word ‘eligible’ so that the discretion to sell the vehicle where an employee resigned would remain with the employer. If they had wanted that the employee who has resigned to be allowed to purchase the vehicle, they would have used the words ‘shall be allowed’ or even given the employee the right of first refusal as in clause 10.2. Clause 10, 3 does not provide for a right of first refusal to the employee nor an option or choice to purchase the vehicle. Clause 10.3 is not an extension of clause 10.2 as the circumstances of the purchase of the vehicle are different. The clauses create two distinct scenarios. Clause 10.3 confers discretion on the employer over the decision to sell the vehicle to

its former employees. I find therefore that the employer retains the discretion under clause 10.3 to sell the vehicle to an employee who has resigned after serving the prescribed period. A motor vehicle policy that provides that an employee is 'eligible' to purchase a vehicle allocated to him after serving a stipulated period has no effect of giving the employee an automatic right or legal entitlement to purchase the vehicle on his resignation. The employer is not bound to sell the vehicle to the plaintiff and cannot be compelled to sell the vehicle concerned and still has discretion over the decision to sell the vehicle to him.

The plaintiff served the company for 2 years 10 months and qualified to purchase the vehicle she was using on her resignation in terms of the motor vehicle policy. Once the plaintiff satisfied the requirements laid out in the policy, she became eligible to purchase the vehicle and thus qualified to purchase the vehicle. Her qualification to purchase the vehicle does not translate to her being allowed to purchase the vehicle. The matter had to go a step further. The employer was required to consider her request and was not obliged in terms of clause 10.3 of the motor vehicle policy to sell the vehicle which the plaintiff was allocated, to her at the time of her resignation. The employer retained discretion over the decision to sell the vehicle to her upon her resignation.

Clause 10.3 of the motor vehicle policy does not oblige the defendants to sell the Toyota Fortuner motor vehicle to the plaintiff.

Once the parties agreed at the pre-trial conference that the plaintiff was entitled to \$49 853.94, being the total claimable for outstanding salaries and arrears, the plaintiff was obliged to ask for an order to that effect at that stage. There was no need for the plaintiff to wait for a full determination of all the issues at a full trial.

In the result it is ordered as follows:

1. Clause 10.3 of the motor vehicle policy does not oblige the defendants to sell the Toyota Fortuner ACU 9960 to the plaintiff.
2. The defendants shall pay to the plaintiff \$49 853.94.
3. Interest therein at the prescribed rate of interest calculated from 31 December 2015 up to the date of full and final payment of all monies due and payable.
4. Defendant to pay costs of suit up to the pretrial conference stage of proceedings.
5. The plaintiff is to pay the defendant's trial costs.

Chihambakwe, Mutizwa & Partners, for the plaintiff's legal practitioners
Mutamangira & Associates, for the defendants' legal practitioners