

SURFACE INVESTMENTS PRIVATE LIMITED
versus
MAURICE CHINYANI

HIGH COURT OF ZIMBABWE
DUBE J
HARARE, 3 June 2014

Opposed Court Application

Adv .Mahere, for the applicant
L.Shambamuto, for the respondent

DUBE J: This is an application for a *rei vindicatio*. The respondent was employed as applicant’s Chief Executive Officer for a five year contract. He was issued with a Mercedes Benz S280. The contract was not renewed after its expiry. He lodged a complaint of unfair labour practice with the Ministry of Labour and that matter was still pending at the time this application was filed. On termination, he refused to hand over the vehicle prompting the applicant to compel him to surrender the vehicle through this application.

The respondent’s defence is that this application is a pure labour issue and that the respondent is challenging his unfair dismissal at the Labour Court which places this matter solely in the hands of the Labour Court. That this court has no jurisdiction to determine this application pending the determination of the matter pending at the Ministry of Labour. On the merits, the respondent’s argument is that he was entitled to purchase the vehicle in terms of the motor vehicle scheme and contract of employment.

The jurisdiction of the Labour Court is governed by Section 89 of the Labour Act, [Cap 28: 01]. The relevant paragraphs read as follows;

“89 (1) The Labour Court shall exercise the following functions—

- (a) hearing and determining applications and appeals in terms of this Act or any other enactment; and
- (b) and
- (c).....;
- (d).....;

(e)

6) No court other than the Labour Court, shall have jurisdiction in the first instance to hear and determine any application, appeal or matter referred to in subsection (1).”

These provisions have been interpreted in a number of cases. In *DHL International (Pvt) Ltd v Clive Madzikanda* HH 51/10 MAKARAU J (as she then was) held that s 89 means that if the dispute is provided for in the act both in terms of the cause of action and the remedy, then the Labour Court has jurisdiction over the matter. Similar sentiments were expressed in *National Railways of Zimbabwe Artisans Union and Ors* SC 8/05 where ZIYAMBI JA in reviewing a matter involving an application for an interdict which had been taken to the labour court remarked thus,

“Thus, the application and the remedies obtainable thereby must be authorised in the Act or the enactment authorising the application to the Labour Court. Nowhere in the Act is the power granted to the Labour Court to grant an order of the nature sought by the respondents in the court a quo, nor have I been referred to an enactment authorising the Labour Court to grant such an order.”

The reasoning of the judge is equally applicable here as both remedies are common-law remedies which the Labour Court has no jurisdiction to deal with. See also *Tuso v City of Harare* 2004(1) ZLR 1(HC). The reasoning behind this is that the Labour Court is a creature of statute and its jurisdiction is confined to the four corners of the statute.

The next issue is whether the High Court has jurisdiction to determine an application for vindication of property where the Labour Court is seized with a dispute over the dismissal of the employee. In *Zimtrade v Maylord Makaya* HH 52/05 MAKARAU J declined to grant a *rei vindicatio* where an employee had been dismissed and the matter was still pending at the Labour Court. She remarked as follows;

“It is in my further view unacceptable splitting of hairs to separate the determination of the validity of suspension from employment, on one hand, from the determination of whether or not that suspension affects the benefits enjoyed by the employee, on the other hand. The two are interdependent and are both governed by the existing employment relationship obtaining between the two parties. The argument that the employer can vindicate his property at any time does not impress me as the employee can always raise the defence of claim of right to possess the property until he or she is effectively and lawfully disentitled to the property.”

This case was followed in *Telecel Zimbabwe (Pvt) Ltd v Naquib Omar* HH 116 /11.

CHIWESHE JP was of the view that the wording of ss 89 (6) and (1) empowers the Labour Court to deal with applications of this nature and further that the legislature intended that all labour disputes be dealt with to the exclusion of any other court by the Labour Court. In *Zimasco (Pvt) Ltd v Farai Maynard Marikano* HH 235/11, the respondent's contract of employment was terminated and he retained the applicant's vehicle. The applicant filed an application for *rei vindicatio* with this court. MTSHIYA J declined to exercise his jurisdiction over the matter on the basis that the matter was a labour dispute. The Supreme Court on appeal set aside the order of the High Court and remitted the matter to the court for determination on the merits before the same judge. The Supreme Court did not expressly deal with the question whether this court has jurisdiction to entertain a *rei vindication* application where the former employee was dismissed and an appeal is pending in the Labour Court. However, it is apparent that the Supreme Court's position was that the High Court has jurisdiction to deal with applications for *rei vindicatio* pending litigation in the Labour Court.

In an earlier case of *Zimbabwe Broadcasting Holdings v Gomo* 2010 (1) ZLR 8 (H, GOWORA J had expressed the view that this type of application can be determined by this court. This case involved an employee who had noted an appeal against her dismissal to the Labour Court. The applicant had in the interim applied for return of its property. The court held that an appeal to the Labour Court did not give the employee the right to retain the property she was in possession of in terms of a contract of employment that had been terminated unless she had a recognisable defence to the claim by the applicant. The court remarked as follows,

“Our law, as it currently stands, is to the effect that once an employee has been suspended or dismissed from employment, any benefits extended to such employee from that relationship cease. In *Chisipite Schools Trust (Pvt) Ltd v Clark*, GUBBAY CJ stated: “Pending the removal of the suspension, the respondent was not entitled to the continued enjoyment of the benefits comprising the free occupation of the Headmistress's house and the continued use of the motor vehicle. A Labour Relations Officer cannot order the respondent to surrender these particular benefits. Consequently, the applicant being unable to resort to self-help approached the High Court for relief, I consider it was justified in doing so”.

The Labour Court is a creature of statute and is only empowered to deal with matters brought to it in terms of s 89 of the Act. This implies that it can only deal with disputes that are provided for in terms of the Act thus in terms of both the cause of action and the remedy sought. *The rei vindicatio* is a common law remedy and is not provided for in terms of the Act. The High Court can deal with this application as it is a court of inherent jurisdiction and

it can do so regardless of the stage at which proceedings at the Labour Court are. This approach is based on the principle that despite an employee's challenge to the dismissal, the employee stands dismissed. What is before me is not a labour dispute. Clearly the Labour Court was not conferred with the jurisdiction to deal with claims of *rei vindication*. A *rei vindicatio* is a common law remedy and the Labour Court has no jurisdiction to deal with common law remedies. MAKARAU J expressed reservations in *Madzikanda [supra]* regarding separation of the determination of validity of suspension from employment and determination of whether a suspension or dismissal affects the benefits enjoyed by the employee. It would be desirable to have a one stop shop for all labour related issues. That simply is not the position at law and will remain so until the legislature has decided otherwise.

I am going to deal with the matter without regard to what is happening at the Labour Court. The application is properly before the court.

The *rei vindicatio* is a common law remedy which is based on the principle that an owner is entitled to recover his property from whoever may possess it without his consent. See *Chetty v Naidoo* 1974 (3) SA 13. The same principle was enunciated in *Mashave v Standard Bank of South Africa Ltd* 1998 (1) ZLR 436 (S) where McNALLY JA stated that the law protects the right of an owner to vindicate his property and "as a matter of policy favours him as against an innocent purchaser".

The same principles governing the law of vindication were outlined in *Oakland Nominees Ltd v Gelria Mining & Investment Co Ltd* 1976 (1) SA 441 (A) at 452A where the court remarked as follows:-

"Our law jealously protects the right of ownership and the correlative right of the owner in regard to his property, unless, of course the possessor has some enforceable right against the owner." See also *Grosvenor Motors (Potchefstroom) Ltd v Douglas* 1956 (3) SA 420 (A) and *Stanbic Finance Zimbabwe v Chivhunga* 1999 (1) ZLR 262 where the court in dealing with the question of onus remarked as follows,

"The owner may claim his property wherever found, from who-so ever is holding it. It is inherent in the nature of ownership that possession of the rei should normally be with the owner and it follows that no other person may withhold it from the owner unless he is vested with some right enforceable against the owner (e.g. a right of retention or a contractual right). The owner, in instituting a *rei vindicatio*, need, therefore, do no more than allege and prove that he is the owner and that the defendant is holding the res, the onus being on the defendant to allege and establish any right to continue to hold against the owner" See also *Unimark Distributors (Pvt)*

Ltd v EFR 94, Silvertondale (Pvt) Ltd 1999 [2] SA 986 where the following sentiments touching on the respondent's defence appear,

“It is inherent in the in the nature of ownership that possession of the res should normally be with the owner and it follows that no other person may withhold it from the owner unless he is vested with some rights enforceable against that owner, e.g. right of retention or a contractual right”

An applicant seeking to rely on the *rei vindicatio* must prove the following,

1. That he is the owner of the property, See *Jolly Shannon and Anor* 1998 [1] ZLR 78
2. That at the commencement of the action, the thing sought to be vindicated was still in existence and the respondent was in possession of the property, See *Masuli v Jera* HH 67/07
3. That the respondent's possession is without his consent, See *Stanbic Finance Zimbabwe (supra)*

It is common cause that the vehicle in issue is owned by the applicant and the respondent possesses the vehicle without its consent. The respondent' term of employment has been terminated. He is only entitled to hold onto the vehicle upon establishing a defence that entitles him to continue holding onto the vehicle The onus is on the respondent to allege and establish the right to continue holding onto the vehicle. The respondent contends that he is entitled to purchase the vehicle in terms of the motor vehicle scheme negotiated at the time he was employed. The respondent avers that in the first three years of his employment he used his own vehicle and the applicant paid all running costs. That he was issued with the vehicle in terms of his contract of employment in June 2010 and only used the vehicle for two years. He contends that his contract of employment entitled him to purchase the vehicle and further that the years during which he used his personal vehicle are part and parcel of the five years, thus entitling him to purchase the vehicle. Clause 6 of his letter of appointment reads as follows:

“**Company Car;** An executive car to be provided in terms of the company's Management Car Scheme which the CEO is expected to develop and operationalize in respect of all managers”

The clause entitles him to use of a company vehicle only and makes no reference to purchase.

The respondent was in terms of his contract required to develop a vehicle scheme. The respondent has produced a motor vehicle scheme which he avers he developed. The applicant

contends that he failed to produce one. The applicant disputed the existence of the undated scheme produced which it claims is fictitious and a fraud and contends that it was created only for purposes of this application. The respondent has asked this court to dismiss the application and refer it to trial on the basis of the existence of a material dispute of fact over the existence of the vehicle scheme. The court is only required to refer a matter for trial where material disputes of facts exist and it cannot resolve the dispute on the papers before it. I am going to take a robust approach and resolve the issue on the papers before me. I will examine the scheme and determine if the respondent was in terms of that scheme entitled to purchase the vehicle.

Clause 4 and 5 of the scheme reads as follows;

“4. Depreciation

Except when directed by the board otherwise or in specific contractual circumstances vehicles will be depreciated over a five year period. At the end of the said period, the employee will be entitled to purchase the vehicle at the residual value, being ten percent of original cost”.

5. Transitional provisions

Where the company is not yet in a position to provide a vehicle ,the eligible employee will be paid for both capital and running expenses for use of their personal vehicles on the same terms and conditions as provided in this motor vehicle scheme.”

The gist of these clauses is firstly that the employee is required to purchase the vehicle at the end of five years. The vehicles would be depreciated over a five year period. Secondly clause 4 presupposes that the incumbent will be required to have driven the vehicle for 5 years before he can purchase it. That vehicle had not been depreciated over a five year period. There was no direction by the board waiving this requirement to sell the vehicle before the 5 years had elapsed. The applicant drove the vehicle for just two years and is not in terms of clause 4 entitled to purchase the vehicle. The transitional provisions make provision for payment of capital and running expenses where the company is not in a position to provide a vehicle. There is no provision that the period over which an employee would have driven his own vehicle would be taken into account for purposes of calculating the five year period. He was paid his capital and running expenses and was therefore adequately compensated. Reference under clause 5 to the effect that such employee would be entitled to capital and running expenses “on the same terms and conditions as provided for in this motor

vehicle scheme'' refers to clause 6 which deals with payment of car maintenance allowances and other running costs.

The respondent has not been able to point to any right or entitlement to the car. The applicant is entitled to the return of its vehicle. The respondent therefore has no basis to continue holding onto the vehicle.

In the result it is ordered as follows;

1. THAT the Respondent be and is hereby ordered, within 24 hours of the grant of this order (or of service of this order on him) to deliver the Applicant's motor vehicle, to wit, a Mercedes Benz Registration number ABP 7891, to the Applicant at its premises, at 20647 Masanga Road, Chitungwiza.
2. That in the event of the Respondent failing to comply with Paragraph 1 hereof, the Deputy Sheriff for Harare be and is hereby ordered, authorized and required, to seize the aforesaid motor vehicle from Respondent, or from whomsoever and wherever it be found, and to deliver same to the Applicant at the aforesaid premises.
3. That in the execution of the provisions of Paragraph 2 above, the Deputy Sheriff be and is hereby authorised to enlist the services and/or assistance of the Zimbabwe Republic Police and/or any other service providers as he may deem necessary.
4. That the costs of this application, together with any costs attendant upon giving effect to this order, shall be paid by the Respondent.

Muzangaza Mandaza & Tomana, applicant's legal practitioners
Matsikidze & Mucheche, respondent's legal practitioners