BINDURA NICKEL CORPORATION LIMITED
versus
OTHNIEL ZVAREVASHE

HIGH COURT OF ZIMBABWE
MTSHIYA J
HARARE, 21 January 2016 and 3 March 2016

Opposed application

T Nyamasoka, for the applicant
Ms *D Gapare,* for the respondent

MTSHIYA J: On 17 September 2015, upon hearing the parties, I granted the following order:-

"1. The respondent be and is hereby ordered to return the applicant's assets being Toyota Hilux double cab Registration Number ABE 5029, a laptop HP Compaq 6720s and a generator.
2. The Deputy Sheriff Harare be and is hereby authorised to seize and attach the applicant's aforesaid properties wherever they can be found and hand them to the applicant.
3. The respondent shall pay the costs of this application."

On 21 January 2016, I received a note from the Registrar informing me that the respondent had appealed to the Supreme Court and therefore wanted reasons for my granting the above order.

These are they.

It is common cause that the respondent was once employed by the applicant as a Mine Manager. In that capacity the respondent was entitled to a motor vehicle. According to the applicant, the respondent was by virtue of his employment entitled to:

"4.1. **Company vehicle**

The respondent was entitled to a Company motor vehicle and at the time that he left Bindura Nickel Corporation the respondent was driving a Toyota Hilux double cab Registration Number ABE 5029.

4.2. **Other Company assets**

The respondent was also entitled to the use of a Company laptop computer which is an HP Compaq 6720s. The Respondent was also entitled to and was using a generator owned by the company."

It is also common cause that on 17 April 2009 the applicant was granted Ministerial approval to retrench its staff on the following conditions:

"**Terms and Conditions of Retrenchment**

Service Pay	1½ month's salary for every year worked
Severance Pay	3 month's salary
Relocation Allowance	Provision of transport as per company policy within 12 months
Loans	To be deducted from the package
Education	As per policy for 2 terms
Housing	Retrenches are to reside in company houses for 12 months or up to when the company re-opens, whichever comes first
Vehicles	To be sold to retrenches at 40% of the Market value irregardless of vehicle age or 20% if over 5 years
Medical Aid	As agreed
Mode of payment	US dollars

Please note: All statutory benefits and agreed items to be paid out accordingly

……
S. NEHOHWA (MRS)
FOR: SECRETARY FOR PUBLIC SERVICE, LABOUR AND SOCIAL WELFARE"

Before the above retrenchment conditions were implemented, the respondent obtained alternative employment but held on to the applicant's assets. He reasoned that his employment terminated on 17 April 2009 when Ministerial approval was granted for the retrenchment package.

The applicant contended that the respondent's acceptance of alternative employment amounted to a repudiation of his contract of employment with it. It argued that the retrenchment package would only apply when implemented.

The respondent does not dispute that he got alternative employment. He also does not deny that the assets he is holding onto belong to the applicant. He, however, states that:

> "8.1. There is no obligation to return the property as it is the subject matter of the ministerial determination for the retrenchment exercise, in terms of which I was entitled to, *inter alia*, "reside at the company house for 12 months…."and the vehicle in question was to be sold "at 40% of the value irregardless of age…."

The above stance by the respondent led to the filing of this application for vindication on 2 September 2009. That development resulted in the order that I granted on 17 September 2015.

In opposing the application, the respondent also raised a point *in limine*, namely that this court has no jurisdiction to determine a labour matter. He submitted that the matter should be argued in the labour court.

Whilst it is true that the dispute herein arises out of an employment contract and hence the argument that the labour court should deal with the matter, it is also correct that the applicant is seeking relief in respect of its assets which are being held onto by a person who is no longer its employee. He accepts obtaining employment elsewhere and thereby repudiating his contract of employment with the applicant. In addition, the Labour Court does not offer the relief sought.

Furthermore s 171 of the Constitution of Zimbabwe Amendment (N0. 20) says the High Court "has original jurisdiction over all civil and criminal matter throughout Zimbabwe." This is a civil matter here in Zimbabwe and therefore the High Court's original jurisdiction over it has not been ousted by the Labour Act [*Chapter 28:01*]. Accordingly the *point in limine* cannot succeed.

Once it is accepted that employment was repudiated, as indicated, it should then be accepted that, any retrenchment exercise would not therefore cover the applicant. The retrenchment package, which was, however, never implemented, came after contract repudiation.

In the main, the principles applicable to *rei vindicatio* (i.e. the relief sought herein) are settled. In the heads of argument the applicant correctly submits as follows:

> "3. The proceedings in casu are for the *rei vindicatio*. The principles applicable to that remedy are settled:
>
> > 'The *rei vindication* is available to an owner for the recovery for his movable or immovable thing from whomsoever is in possession or detention of the thing, irrespective

> of whether the possession or detention is *bona fide* or *male fide*. The age old maxim *ubi rem invenio ibi vindico* applies….. An owner instituting the *rei vindicatio* must prove that:
>
> (a) he is the owner of the thing……
> (b) The thing is still in existence and clearly identifiable…….
> (c) The defendant has possession or detention of the thing at the moment the action is instituted."

It is the above principles that were applied in the case of *Hwange Colliery Company* v *Tendai Savanhu*, HH 395/13, where this court ordered the release of the plaintiff's assets. Tendai Savanhu who was a former chairman of the Hwange Colliery Company Board of Directors had held on to a vehicle belonging to the colliery company. In that case, after citing a number of authorities, Dube J, concluded:

> "The defendant's right to use the vehicle ceased when he left the plaintiff's company. The fact that other directors were allowed to purchase their issues does not confer rights on him to purchase the vehicle. I agree with *Advocate Uriri's* contention that the hope and expectation of an offer does not justify possession of the vehicle. The defendant's expectation that the vehicle would be sold to him is not legitimate. His hold onto the vehicle is unlawful. The defendant has failed to show that he has contractual or enforceable rights against the plaintiff. He has no legal justification to continue holding onto the plaintiff's vehicle".

In *casu*, the respondent admits that the vehicle, lap top and generator are the property of the applicant. There is no contract which says that after leaving the employment of the applicant for any reason, the respondent would be entitled to the assets.

Apart from the fact that he was no longer entitled to any retrenchment benefits, the law does not make it compulsory for an affected entity to implement a retrenchment package approved by the Minister. It merely says, in my view, "should retrenchment take place, then it would be mandatory to proceed in terms of the approved retrenchment package".

In *Joran Nyahora* v *CFI Holdings (Private) limited* SC 81/14, where a similar situation arose, the Supreme Court had this to say:

> "It may be mentioned here that in most cases the option granted by an employer to purchase a used company car is a privilege accorded to its employees perhaps in the hope that this will induce loyal service as well as a culture of caring for the company property or some other reason beneficial to the employer/company. Therefore, unless the contract specifically states so, a court ought to be careful not to read a legal right into a policy matter which is for the discretion of the employer. In my judgment the question of a right to purchase could only arise after an offer had been made to, and accepted by, the employee to purchase the vehicle and not before.
>
> As matters now stand, no offer has been made to the appellant by the respondent employer. The terms of the purchase have not been set. The appellant has no sale agreement on

which to found his alleged right to purchase. He is not entitled to hold onto the vehicle pending agreement. As it was put by Makarau JP (as she then was) in *Medical Investments Limited* v *Pedzisayi* HH 26/2010:

> 'I am unaware of any law that entitles a prospective purchaser to have possession of the merx against the wishes of the seller, prior to delivery of the merx in terms of the sale agreement"

Clearly, in terms of the above principles of law, even if the retrenchment package had applied to the respondent, there would still have been need for formal offers to be made to the respondent to buy the asset(s). That never happened.

In view of the foregoing, there was no legal basis upon which the respondent could continue to hold onto the assets of the applicant.

It was for the above reasons that I granted the order referred to at p 1 of this judgment.

Messrs Arthersone & Cook, applicant's legal practitioners
Messrs Schonlen & Holderness, respondent's legal practitioners