

PREMIER SERVICE MEDICAL AID SOCIETY
versus
HENRY MANDISHONA

HIGH COURT OF ZIMBABWE
CHAREWA J
HARARE, 23 March & 4 April 2017

Opposed Application – Leave to execute pending appeal

Advocate *F Mahere*, for the applicant
Advocate *N Chamisa*, for respondent

CHAREWA J: This is an application for leave to execute on an order of *rei vindicatio* granted by this court on 19 July 2016 in HC 310/16.

The summary of the facts and background of this case are that the applicant terminated the respondent's employment pursuant to disciplinary proceedings conducted on 16 and 17 November 2015. The respondent was advised of his dismissal on 24 November 2015.

It is common cause that during the course of his employment, respondent was entitled to use of a motor vehicle, Mercedes Benz E300 Model, Registration No. AD4658. There is no dispute that the vehicle was the property of the applicant and was not at any stage ever going to become the property of the respondent.

Therefore, upon termination of respondent's employment by letter dated 24 November 2016, applicant requested respondent to return its vehicle by 1200 hours on 26 November 2015. The respondent refused, neglected or failed to return the vehicle.

The applicant therefore obtained the vindicatory order aforesaid. The respondent has since appealed the judgment granting the order of *rei vindicatio* to the Supreme Court. Pending that appeal, the applicant now seeks leave to execute on the vindicatory order.

The respondent opposes the application on the ground that the disciplinary proceedings by which his employment was terminated by the applicant were unlawful. In any

event, the Labour Officer subsequently, and on 29 January 2016, ordered his reinstatement. Therefore he is still an employee of the applicant entitled to the right of retention of the vehicle pending lawful termination of his employment.

THE LAW

The requirements to succeed in an application for leave to execute pending appeal.

The Supreme Court has settled the law governing an application for leave to execute pending appeal.¹ The markers laid down by the Supreme Court are that the court to which such an application is made has a very wide discretion whether to grant or refuse such leave. In exercising such discretion, the court must determine what is just and equitable having had regard to the following requirements:

- i. The potential for the appellant (respondent in the application) suffering irreparable harm or prejudice should leave be granted;
- ii. The other side of the coin being the potential for the respondent (applicant in the application) to suffer irreparable harm or prejudice should the leave to execute be denied;
- iii. The balance of hardship or convenience should there be potential of irreparable harm to either the appellant or the respondent; and finally
- iv. The prospects of success on appeal. In this regard, the court must consider whether the appeal is frivolous and vexatious, or is not *bona fide*, either because it is not a genuine search to reverse the judgment but is meant to gain time or harass the other party.

The requirements to withstand an application for leave to execute pending appeal

Therefore, in order to succeed against an application to execute pending appeal, the respondent must show that

- i. There are good or reasonable prospects of success on appeal,
- ii. The potential harm in allowing execution pending appeal is irreparable; and/or

¹ Net One Cellular (Pvt) Ltd v Net One Employees & Anor 2005 (1) ZLR 275 (S) @281A-D

iii. The balance of hardship weighs in its favour.

Prospects of success on appeal: the requirements to succeed against an order of *rei vindicatio*

This being an application predicated on *rei vindicatio*, once the applicant has shown that it is the owner of the thing, which still exists, is clearly identifiable and was in the respondent's possession², the onus is on the respondent to show the existence of a contractual right to possession. That right cannot exist where the contract is invalid or has been terminated.

Our law thus jealously guards the rights of an owner of property against deprivation without its consent. It is therefore enough, to succeed on a vindictory claim or to fail in an appeal against a vindictory order, for the applicant to show that it is the owner of the property and the respondent is holding onto it against its will.³

In that respect, it follows that the jurisprudence in our jurisdiction is to the effect that in an employment relationship, once the employee is suspended or dismissed, any benefits accruing from that employment cease to exist.⁴ And where a right of retention is premised on a contract of employment, a party may successfully withstand any appeal against an order of *rei vindication* by the mere proof that the employment relationship is terminated.

Whether the termination of the employment relationship, the suspension from employment or dismissal is unlawful, or whether there is an order of reinstatement which the employer clearly has no intention to comply with or whether an appeal has been noted against such termination, suspension or dismissal, seems to me to be irrelevant. An employee stands suspended or dismissed as long as the employer is not willing to reinstate him or her. And by that reason, no right of retention of the property of the employer accrues to the employee as the contract remains terminated.

ANALYSIS

Irreparable harm

² Chetty v Naidoo 1975 (3) SA 13

³ See Zimasco v Marikano HH 235/11 and Telecel Zimbabwe (Pvt) Ltd v Dzingwa Madzimba HH 704/16.

⁴ Zimbabwe Broadcasting Holdings v Semukeliso Gono HH 162/09. See also Mashave v Standard Bank of South Africa Ltd 1998 (1) ZLR 436, Nyahora v CPI Holdings (Pvt) Ltd SC 81/14.

The applicant submitted that it stands to suffer irreparable harm as its vehicle continues to depreciate, and such depreciated value cannot be reclaimed. The respondent did not address this issue at all. Rather, all respondent said was that since he wishes to retain the vehicle he will not be reckless with it. Whether or not respondent handles the vehicle with extreme care and does not cause any damage or danger to it, the fact remains that it is subject to depreciation. The respondent has not addressed how such loss due to depreciation will not cause irreparable harm to the applicant.

Neither has respondent addressed what irreparable harm he stands to suffer should applicant's motor vehicle be returned to it. In fact, he submitted that he has made an application for quantification of the damages due to him in the face of applicant's refusal to reinstate him, thus showing that he will be adequately compensated by damages for any harm that may befall him due to any improper termination of his employment.

Balance of hardship

The motor vehicle was given to the respondent in order for him to properly perform his duties as an employee of the applicant. The facts on the ground are that the respondent has been terminated by the applicant, which has refused to reinstate him as ordered by the Labour Officer. He is therefore not performing any duties for the applicant for which he would be entitled to hold onto the vehicle. There is therefore no hardship that he is liable to suffer with respect to deprivation of an asset which he cannot now use for its intended purpose.

Rather, the balance of hardship in my view weighs against the applicant which is unable to give the vehicle to employees carrying out the duties that respondent used to carry out.

The equities of the matter, in my view, favour the applicant, particularly when regard is had to the fact that the respondent does not, at this stage have any claim for damages for unlawful termination of his employment before the courts. While I note that he has applied for a quantification of the Labour Officer's award of reinstatement, I am not certain how such quantification can be made where there is no award for damages. In other words, I see no justification for respondent's claim of a lien over the vehicle until damages are paid, when no such damages have been claimed.

In any event, should the respondent eventually obtain his award for damages, there is no impediment against his executing thereon.

Prospects of success on appeal

The respondent is clinging to the determination of reinstatement awarded by a Labour Officer, which is extant, as justification for his “continued employment” with applicant, and therefore that he has accrued a right to retain the vehicle pending the resolution of the labour dispute between the parties.

While I note that the award by the Labour Officer has not been appealed against, and does not fall within my mandate to review, I do wonder at the propriety of an order of reinstatement without the option of payment of damages. Our jurisprudence treats an employment relationship in a similar way to a marriage relationship. The courts do not force a marriage relationship between the parties. Similarly the courts do not force an employment relationship between the parties. There can therefore be no question of the order or *rei vindicatio* or an order for leave to execute pending appeal subverting the Labour Officer’s award as averred by the applicant.

In fact, the question that arises is whether the respondent can insist that he is still an employee of applicant entitled to benefits in terms thereof, or whether the respondent ought to have sought the alternative relief of damages. I can only liken the respondent’s conduct to that of a spouse who refuses to be divorced and insists on holding on to a worthless marriage certificate.

The only defence to a vindictory order that can ground reasonable prospects of success on appeal is that the respondent has a contractual right of retention of the vehicle. In that regard, I note that Mr *Chamisa* did concede that, at law, the respondent does not in fact have a right to reinstatement. Therefore, if there is no right of reinstatement, there is no longer any contract of employment. And if that is so, then respondent cannot have accrued any right of retention of the applicant’s motor vehicle as he can only retain the vehicle on the basis of an employment relationship.

In any event, it matters not, in my view, whether the termination of respondent’s employment was wrongful or not, or contrary to the Labour Officer’s award. That is a matter for the labour dispute resolution processes to resolve to finality. The issue here is whether or

not, according to the jurisprudentially established principles of *rei vindicatio*, the applicant was entitled to the return of its property once it deemed the respondent's employment terminated. In that respect, I must agree with the decision reached by the court a quo and would be very surprised if the Supreme Court reached a different conclusion.

I therefore do not see that the respondent has any reasonable prospects of success on appeal.

In the premises I find that respondent's notice and grounds of appeal are frivolous and vexatious. I am not convinced that such notice was made with any *bona fide* intention to reverse the judgment of the court a quo, but was merely intended to gain time or harass the applicant.

It is thus just and equitable that the applicant be allowed to execute on the judgment of the court *a quo* pending appeal.

Costs

Applicant has alleged that respondent's attitude is frivolous and vexatious. His legal practitioner ought to have realised that there was no competent and legally recognisable right of retention of the motor vehicle once applicant terminated the employment contract. Further, the notice of opposition being predicated mostly on the lawfulness or otherwise of the termination of the employment contract was totally irrelevant and inappropriate in vindicatory processes. Further the opposing affidavit and notice and grounds of appeal are predicated on information which was not before the court a quo. For these reasons, costs on the higher scale ought to be awarded as there is no justification on the facts or at law for the opposition to this application. I cannot agree more with the applicant's position.

In the premises I make the following order:

1. Leave to execute pending appeal is granted.
2. The respondent to pay the applicant's costs of suit on a legal practitioner and client scale.

Muzangaza Mandaza and Tomana, applicant's legal practitioners
Atherstone & Cook, respondent's legal practitioners