

WILLIAM BAIN & COMPANY HOLDINGS (PVT) LTD
versus
BRAVEMAN NYAKWENDE

HIGH COURT OF ZIMBABWE
MAKONI J
HARARE, 6 October 2016 and 3 May 2017

OPPOSED MATTER

N M Phiri, for the applicant
F Siyakurima, for the respondent

MAKONI J: The brief background to the matter is that the parties had an employer-employee relationship from October 2002 to October 2014. During the course of the relationship, the respondent was entitled to the use of a motor vehicle namely Mazda BT50 registration number ABI-6903 (the motor vehicle). The motor vehicle is owned by the applicant. On 3 October 2014, the applicant commenced a procedure to retrench the respondent.

During the negotiations of the retrenchment package, the issue of the motor vehicle came up for discussion with the applicant considering to sell the motor vehicle to the respondent.

Before the retrenchment exercise was complete, the respondent took up employment with another company and commenced work on 1 November 2014. The respondent did not return the motor vehicle to the applicant prompting the applicant to file the present application.

The applicant's basis for seeking the claim of *rei vindicatio* is that it is the owner of the motor vehicle and the respondent does not have a legal right to remain in possession of its property.

The application is opposed by the respondent on three grounds. The respondent avers that this court has no jurisdiction to entertain a labour dispute. He avers that the retrenchment process initiated by the applicant is still pending and the motor vehicle is part and parcel of the retrenchment package. Secondly he avers that he has right to hold on to the motor vehicle until

the applicant completes the retrenchment exercise it commenced. Thirdly he avers there in terms of the applicant's policy, he was entitled to purchase the motor vehicle.

Whether the High Court has jurisdiction to deal with this matter

This issue has come before our courts on a number of occasions where the employer claims *rei vindicatio*.

MATHONSI J in *William Bain and Company Holdings (Pvt) Ltd v Amon Nyamukunda* HH 309/13 at p 2 had this to say about such matters

“I intend to deal with the issues which fall for determination in turn. Regarding the issue of jurisdiction this court has stated on times without number that its jurisdiction has been ousted by the provisions of s 89 (6) of the Labour Act [Cap 28:01] only in those matters where the Labour Court is granted specific jurisdiction by s 89 of the Act: *Medical Investments Ltd v Pedzisayi* 2010 (1) ZLR 111 (H) 114C; *DHL International Ltd v Madzikanda* 2010 (1) ZLR 201 (H) 204 B-D; *Moyo v Gwindingwi N.O & Anor* HB 168/11 at p 5-6; *Jambwa v GMB* HH 124/13; *PG Industires (Zimbabwe) Ltd v Machawira* HH 255/12.

The Labour Court enjoys exclusivity in all matters where the cause of action and the remedy are all provided for in the Act. Outside that, for instance where the cause of action and the remedy are located in the common law, the ouster provision in the Labour Act has no application and this court will exercise jurisdiction.”

It is not in dispute that the respondent is now employed elsewhere. In *casu* the contract of employment between the parties was terminated when the respondent assumed employment with another employer on 1 November 2014. This occurred when the retrenchment process was ongoing.

I would want to agree with the position adopted by the applicant that the respondent repudiated to contract by taking up employment else. Where the retrenchment process was ongoing and an employer has a discretion to choose to institute or withdraw the exercise at any point in time. In between, the employee remains in the employment of the employer. The employment can only be terminated, in the words of ZIYAMBI JA in *Freda Rebecca Gold Mine Holdings Limited v Nhliziyo & 180 Ors* SC 13/06.

“Until the appellant (employer) notified the respondents of the termination of their employment by virtue of the fact that the proposed retrenchment was going to be effected by the appellant, the respondents remained in the employment of the appellant who was entitled to recall them back to work.”

In instances where the contract of employment would have terminated, there would be no labour dispute to talk about and this court would have jurisdiction to deal with the matter.

Merits

Rei Vindicatio

The authors Siberberg and Shoeman in *The Law of Property* 5th ed p 242 explain this claim as follows:

“The principle that owners cannot be deprived of their property against their wills means that an owner is entitled to recover property from any person who retains possession of it without his or her consent. This rule was considered in *Chetty v Naidoo* where Jansen JA explained that one of the incidents of ownership is the entitlement of exclusive possession of the *res*, with the necessary corollary that the owner may claim his property wherever found, from whomsoever holding it” According to the court it is inherent in the nature of ownership that possession of the thing should normally be with the owner, and it follows that no other person may withhold it from the owner unless he or she is vested with some right enforceable against the owner (for example, a right of retention or a contractual right).”

This was captured in a simplified manner by ZIYAMBI JA (as she then was) in *Nyahora v CZI Holdings (Pvt) Ltd* 2014 (2) ZLR 607 (S) at 613 D-E when she stated:

“The *actio rei vindicatio* is available to an owner of property who seeks to recover it from a person in possession of it without his consent. It is based on the principle that an owner cannot be deprived of his property against his will. He is entitled to recover it from any one in possession of it without his consent. He has merely or allege that he is the owner of the property and that I was in the possession of the defendant/respondent at the time of commencement of the action or application. if he alleges any lawful possession at some earlier date by the defendant then he must also allege that the contract has come to an end. The claim can be defeated by a defendant who pleads a right of retention or some contractual right to retain the property.

In *casu*, the respondent is raising a claim of right based on the fact that the applicant had agreed to sell the motor vehicle to him as part of the retrenchment package. He also contends that on account of the employment relationship between the parties and in line with the applicant’s policy, the motor vehicle in question was supported to be sold to him in 2014.

With regards to the agreement, I examined the documents attached by the respondent and do not find any document confirming the agreement to sell the motor vehicle to him. The minutes of the meeting attached as Annexure D reflects item No. 4 headed “Company Assets”. There is no mention of the motor vehicle. In any event the applicant did not commit itself to selling the assets referred in item 4.

Annexure E is an offer by the applicant to the respondent in respect of the retrenchment package. The motor vehicle is not included. Annexure 2 is a letter dated 21 October 2014 addressed to the respondent confirming that the motor vehicle had at that stage nil book value.

Annexure G are the minutes of a meeting held between the applicant representatives and the respondent. Item no 3 lists what the parties agreed on. The motor vehicle is not among those items. It is made reference to in item 4 under issues not agreed on. It is indicted that the applicant is prepared to negotiate the price of the motor vehicle. There is no other document to confirm that the parties later agreed on the purchase price.

It is trite that the essential elements of a sale are that the seller must intent to sell and the buyer to buy, and there must be agreement on the subject matter of the sale and on the price to be paid for it. See G Bradfield and K Lehmann. *Principles of the Law of Sale & Lease* 3rd Ed at p 24. In *casu*, the parties did not agree on the purchase price. There was therefore no contract of sale.

In respect of the claim that the respondent was entitled to purchase the car in terms of the company policy, I will rely on the remarks made by ZIYAMBI JA in *Nyahora supra* which is almost on all fours with the present matter. She stated at p 613 H and 614 B –C.

“It may be mentioned that in most cases the option granted by an employer to purchase a used company car as a privilege accorded to its employees perhaps in the hope that this will induce loyal service as well as a culture of caring of 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.

In *casu*, the motor vehicle reached “completion of four years of purchase” in June 2014. At the time the respondent assumed employment with a new employer, the applicant had neither made a decision to dispose of the motor vehicle nor offered it to the respondent. The respondent is no longer an employee of the applicant and the rights that might have accrued to him in terms of the policy ceased when he ceased to be an employee of the applicant. The respondents’ further claim of legitimate expectation was again answered by ZIYAMBI JA in *Nhahora’s case supra* when she stated at p 614 E:

“The appellant’s further claim that he had a legitimate expectation to purchase the vehicle is, in my view, also without merit. It seems to me that whatever expectation he had to purchase the vehicle is merely that: an expectation. It has no legal basis. It is not justiciable. It cannot be converted into a claim of right. ”

In view of the above, the applicant has made out a case for *rei vindicatio*. The respondent has failed to establish a claim of right in respect of the motor vehicle.

In the result, I will make the following order.

- “1. The respondent be and is hereby ordered to return the Mazda BT50 Registration No. ABI-6903 motor vehicle and all its documents.
2. Respondent to pay for costs of suit on a Legal Practitioner and Client Scale,
3. If Respondent does not return the motor vehicle within 48 hours of this order, the Sheriff of the High Court be and is hereby ordered to facilitate the return of the Mazda BT50 single cab motor vehicle Registration No. ABI – 6903 to Applicant.”

Muvingi Mugadza, applicant’s legal practitioners
Sawyer & Mkujshi, respondent’s legal practitioners