

FORESTRY COMMISSION  
versus  
BETTY MUWONDE

HIGH COURT OF ZIMBABWE  
CHAREWA J  
HARARE, 29 November 2017 & 10 January 2018

### **Opposed Application – Summary Judgment**

*Ms S Makani*, for the applicant  
Respondent in person

CHAREWA J: I granted an application for summary judgment in this matter on 29 November 2017 by consent of the parties in the following terms:

1. The application for summary judgment be and is hereby granted against the respondent as follows:
  - a) A declaration be and is hereby made that respondent is no longer entitled to occupy the property being house number 4 Zimbabwe College of Forestry, 1 Bather Road, Christmas Pass, Mutare.
  - b) An order for eviction of the respondent, her subtenants and assignees from the premises known as house number 4 Zimbabwe College of Forestry, 1 Bather Road, Christmas Pass, Mutare within five (5) days be and is hereby granted.
  - c) It is ordered that in the event that the respondent, her sub-tenants and assignees fail to comply with the order in b) above, the Sheriff or his lawful deputies be empowered to evict respondent, her sub-tenants and assignees from the property.
  - d) There be no order as to costs.

The respondent having now requested for a full judgment in order “to pursue (her) case further” hereunder are my reasons for judgment.

### **Facts**

The summary of the facts and background of this case are that the applicant terminated the respondent’s employment pursuant to disciplinary proceedings. In terms of her contract of employment, respondent was entitled to occupation and use of house number 4 Zimbabwe College of Forestry, 1 Bather Road, Christmas Pass, Mutare (the property). Upon termination of employment, applicant issued summons wherein it sought to vindicate its property by seeking a declaratory order that respondent was no longer entitled to occupy the premises, an order of eviction against respondent and all those claiming occupation through her, as well as an order for holding over damages in the amount of \$13 per day calculated from May 2013 to date of vacation, and that in the event that the respondent, her subtenants or assignees failed to comply with the order to vacate, the Sheriff be empowered to evict her.

### **Issues**

The only issue that I had to determine was whether the applicant was entitled to summary judgment in the circumstances of the case.

### **Parties’ submissions**

Applicant submitted that it was entitled to summary judgment in view of the fact that its claim was based on a *rei vindicatio* in that respondent’s right to occupation was predicated on her employment with applicant. The employment having been terminated on disciplinary grounds, the right of occupation also terminated and defendant was obliged to restore to applicant its property which she was only entitled to by virtue of her employment. In that respect, respondent did not have any good or *bona fide* defence to applicant’s claim and therefore summary judgment ought to be granted.

On her part, the respondent was of the view that since she was contesting the termination of her employment, there was a labour dispute which entitled her to remain in occupation until that dispute was resolved. In particular, she was of the view that she ought to be paid her damages for termination of employment before she vacates the premises.

### **The law**

With regard to the law on summary judgment I will not reiterate the obvious which has been stated and restated in countless cases in our jurisdiction. It is enough to state that for a respondent to defeat an application for summary judgment, she must aver facts on the merits which would enable her to succeed in the main matter, or at the very least, raise a *prima facie* defence.<sup>1</sup>

The law with regard to *rei vindicatio*, particularly in the context of employment disputes is also trite. 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 possession<sup>2</sup>, 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.

In that respect, it follows that the jurisprudence in our jurisdiction is to the effect that in an employment relationship, once the employee is dismissed, any benefits accruing from that employment cease to exist.<sup>3</sup> And where a right of retention is premised on a contract of employment, a party may successfully obtain restoration of its property by the mere proof that the employment relationship is terminated.

Whether the termination of the employment relationship is unlawful, or whether there are any damages due to a respondent as a consequence of the termination of employment seems to me to be irrelevant. An employee stands dismissed as long as the employer is not willing to reinstate him or her. For that reason, no right of retention of the property of the employer accrues to the employee as the contract remains terminated.

Therefore, the only defence to a vindicatory claim that can ground reasonable prospects of success to defeat summary judgment is that the respondent has a contractual right of retention of the property.

### **Analysis**

The applicant was dismissed from employment. She has not asserted, nor does she in fact have a right to reinstatement. Therefore, there is no longer any contract of employment between her and applicant. In that regard, respondent has not accrued any right to continued

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<sup>1</sup> See *Jena v Nechipote* 1986 (1) ZLR 29 (S)

<sup>2</sup> *Chetty v Naidoo* 1975 (3) SA 13

<sup>3</sup> *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.

occupation of the applicant's property as she can only remain in occupation on the basis of an employment relationship.

I note, even though it matters not, that respondent did not allege that the termination of her employment was wrongful or unlawful. After all, that is a matter for the labour dispute resolution processes to resolve to finality, and is immaterial to applicant's claim. 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.

It is clearly unreasonable and untenable for the respondent to insist that she is still an employee of applicant entitled to the benefit of occupation of applicant's house merely because there is a labour dispute. That she claims an employment relationship based on non-payment of a labour award or damages is clear proof of her lack of appreciation of the law.

Her claim for damages or terminal benefits is divorced from the requirements of *rei vindicatio*, and it is unjustifiable for her to seek to tie her claim to applicant's entitlement to restoration of its property. Certainly, it is no defence to *rei vindicatio*, in the circumstances to claim that there is a labour dispute or to insist that one remains an employee until damages or a labour award is paid as claimed by the respondent *in casu*.

In that respect, I must agree with applicant that respondent has not raised any *bona fide* defence to its claim and that therefore summary judgment ought to be granted as prayed for.

These legal requirements and ramifications were clearly explained to the respondent by the court. She claimed to have understood and conceded that in that case she had no defence to summary judgment. I therefore do not regard the request for the full judgment and intention to pursue the matter further by the respondent as genuine or *bona fide* but is merely intended to gain time or harass the applicant.

### **Costs**

Applicant had claimed for costs on the higher scale on the grounds that respondent did not have a *bona fide* defence but had entered appearance to defend merely as a dilatory tactic. It submitted therefore that respondent ought to be made aware of the court's displeasure by an order of higher costs. However, upon the concession to summary judgment being made,

applicant understood that as a self-actor, respondent may not have had the benefit of a sound explanation of her rights and kindly agreed to an order with each party bearing its own costs.

*Dube Manikai and Hwacha*, applicant's legal practitioners