

REPORTABLE (64)

JORAM NYAHORA
v
CFI HOLDINGS PRIVATE LIMITED

SUPREME COURT OF ZIMBABWE
ZIYAMBI JA, GWAUNZA JA & PATEL JA
HARARE, JANUARY 28, & OCTOBER 23, 2014

C Venturas, for the appellant

Advocate *L Uriri*, for the respondent

ZIYAMBI JA: This appeal deals with the oft recurring question whether an employee whose contract of employment has been terminated, and who has appealed to the Labour Court against that termination, is entitled, pending resolution of the appeal, to retain a motor vehicle allocated to him for the performance of his duties during the course of his employment. It also addresses the question of the jurisdiction of the High Court in these circumstances to grant relief to the employer under the *rei vindicatio*.

The appellant, who was employed by the respondent as the Chief Executive officer of its subsidiary Victoria Foods (Pvt) Ltd, was, on 3 August 2012, suspended without pay and benefits pending disciplinary proceedings to be brought against him. He was ordered to return to the respondent a certain motor vehicle a BMW X5 allocated to him for use in the

performance of his duties as respondent's employee. He refused to do so and an additional charge of wilful disobedience to a lawful order was preferred against him.

On 3 October 2012, the determination of the disciplinary authority finding him guilty of misconduct and dismissing him from employment with the respondent was communicated to the appellant by a letter to his legal practitioners. In the same letter, the appellant was directed to surrender the vehicle to the respondent by 5 October 2012, failing which it was intended to hand the matter over to legal practitioners to obtain recovery thereof. When no positive response to the letter was received, the respondent successfully filed an urgent application in the High Court for a provisional Order. The order, dated 16 October 2012, and granted by consent of the parties, read as follows:

“TERMS OF FINAL ORDER

That you show cause to this Honourable Court why a final order should not be made in the following terms:-

1. That the respondent be and is hereby ordered to surrender possession of and to return to applicant the motor vehicle namely a **BMW X5 registration number AAX 8022** upon service of this order failing which the Deputy Sheriff be and is hereby authorised to take all and any such steps as may be necessary to recover the said motor vehicle from the respondent or any person whomsoever is in possession thereof on the authority of the respondent and return it to the applicant.
2. That the respondent shall pay the costs of suit on the Law Society of Zimbabwe scale of attorney and client.

INTERIM RELIEF GRANTED

Pending the confirmation or discharge of this Provisional Order Applicant is granted the following relief:

1. That the motor vehicle namely a **BMW X5 registration number AAX 8022** be and is hereby placed judicial attachment.
2. The respondent be and is hereby ordered to surrender and return the motor vehicle to the applicant's premises being c/o Victoria Foods (Private) Limited, 83

Woolwich Road, Willovale, Harare where it shall be kept/stored by the applicant pending the return day.

3. In the event of the respondent failing to comply with the terms of paragraph 2 of this order, the Deputy Sheriff be and is hereby directed and authorised to take any or all such steps as are necessary to recover the motor vehicle from the respondent or any person whomsoever is in possession thereof on the authority of the respondent and return it to the applicant for purposes of compliance with paragraph 2 of this order.
4. Both the applicant and the respondent are hereby prohibited/interdicted with immediate effect from driving, using or in any manner dealing with the motor vehicle and/or allowing any other person to do so except for the purposes of complying with this provisional order.”

On the same day, the appellant appealed to the Labour Court against his dismissal by the disciplinary authority of the respondent.

The provisional order was confirmed by the High Court on 24 July 2013. The appellant now appeals against the whole judgment of the High Court on grounds, firstly, that the High Court had no jurisdiction to entertain the matter; and, secondly, that in terms of the contract of employment, the appellant had a right to purchase the vehicle which right constituted a defence to the vindicatory action brought by the respondent.

THE JURISDICTION OF THE HIGH COURT

It was submitted by Mr *Venturas* that judicial authority in this jurisdiction has established the principle that the jurisdiction of the High Court is specifically ousted in cases such as the present. Reference was made to s 89(6) of the Labour Act [*Cap 28:01*] (“the Act”) which, it was submitted, (as I understand the submission) conferred exclusive jurisdiction on the Labour Court in all matters concerning or linked to employment issues. It was submitted that

the possession of the motor vehicle was so interdependently linked to the contract of employment of the appellant that one cannot decide one without deciding the other. Therefore, so the submission went, because the Labour Court has exclusive jurisdiction over one, it also has exclusive jurisdiction over the other¹.

It was further submitted that the noting of the appeal to the Labour Court had suspended the decision of the disciplinary authority dismissing the appellant, and (presumably as an employee) he was therefore entitled to retain possession of the motor vehicle until his appeal was finally resolved by the Labour Court.

Mr *Uriri* contended, however, that this was not one of the matters over which the Labour Court could exercise jurisdiction in terms of s 89 of the Act which circumscribes the limits of its jurisdiction; that the High Court is a superior court with inherent jurisdiction; and that there is a presumption against the ouster of the jurisdiction of a court unless this is clearly the intention of the legislature. He referred the Court to *De Wet v Deetlefs*² where the principle was stated by SOLOMON CJ as follows:

“It is a well-recognized rule in the interpretation of statutes that, in order to oust the jurisdiction of a court of law, it must be clear that such was the intention of the legislature.”

And also to the following remarks by INNES CJ in *R v Padsha*³:

“It is competent for Parliament to oust the jurisdiction of the courts of law if it considers such a course advisable in the public interest. But where it takes away the right of an aggrieved party to apply to the only authority which can investigate, and, where

¹ Counsel relied on *DHL International (Pvt) Ltd v Madzikanda* 2010 (!) ZLR 201. See also *Zimtrade v Makaya* 2005 (1)ZLR 427 (H)

² 1928 AD 286 at 290

³ 1923 AD281 at 304

necessary, redress his grievance, it ought surely to do so in the clearest language. Courts of law should not be astute to construe doubtful words in a sense which will prevent them from doing what is *prima facie* their duty, namely from investigating alleged injustice or illegality.”

In line with the above, he submitted, any provision in any statute or contract that purports to oust the jurisdiction of the courts is restrictively interpreted.

It was submitted further that an examination of the provisions of s 89(6) of the Act, which must be read with s89(1), clearly shows that s 89(1)(a) grants power to the Labour Court to hear applications and appeals already defined in the Labour Act or any other enactment that makes reference to the Labour Act.

DETERMINATION

The Labour Court is a creature of statute. Its jurisdiction is set out in s89 of the Act. Sections 89(1) & (6) are set out hereunder:

“89 Functions, powers and jurisdiction of the Labour Court

(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) hearing and determining matters referred to it by the Minister in terms of this Act; and
- (c) referring a dispute to a labour officer, designated agent or a person appointed by the Labour Court to conciliate the dispute if the Labour Court considers it expedient to do so;
- (d) appointing an arbitrator from the panel of arbitrators referred to in subsection (6) of section *ninety-eight* to hear and determine an application;

(d1) exercise the same powers of review as would be exercisable by the High Court in respect of labour matters;

(e) doing such other things as may be assigned to it in terms of this Act or any other enactment...

(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).”

The exclusive jurisdiction conferred by s 89(6) relates only to the hearing and determination, in the first instance, of any application, appeal or **matter referred to in subsection (1)**. Subsection 1(a) in turn clearly limits that jurisdiction to applications and appeals in terms of this Act or any other enactment.

Instances in which applications and appeals may be made in terms of the Act are clearly set out in the Act and need no further elaboration. Reference was made, among others, to the applications referred to in ss 92C and 93(7) of the Act⁴. These are applications in terms of the Act and no other court has jurisdiction to hear or determine such applications at first instance.

Applications or appeals in terms of any other enactment would be those where that enactment specifically provides for an application or an appeal to be made to the Labour Court. We were referred, by way of example, to the Public Service (General Conditions of Service) Regulations S.I. 1/2000 which makes reference to an appeal to the Labour Court against a decision of the Public Service Commission. As it was put, the words “any other enactment” is limited to those pieces of legislation that specifically make provision for an application or an appeal to the Labour Court.

⁴ See also *National Railways of Zimbabwe v Zimbabwe Railways Artisans Union & Others* SC 8/05

As submitted on behalf of the respondent, the right of an individual to approach the High Court seeking relief other than that specifically set out in s 89 1 (a) of the Act, has not been abrogated. Nothing in s 89(6) takes away the right of an employer or employee to seek civil relief based on the application of pure principles of civil law, except in respect of those applications and appeals that are specifically provided for in the Labour Act. Nor is there contained in s 89 any provision expressly authorizing the Labour Court to deal with an application, such as in the instant case, for the common law remedy of *rei vindicatio*. Such applications fall squarely within the jurisdiction of the High Court.

In any event, as the court *a quo* found, by consenting to the provisional order, the appellant had acquiesced in the jurisdiction of the High Court to grant it. The appeal on this ground therefore fails.

THE CLAIM OF RIGHT

The action *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 to allege that he is the owner of the property and that it 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 the present case, the respondent raised a claim of right. It was based on the company's motor vehicle policy scheme for its employees clause 5.2 of which provides:

“The vehicle will be replaced on completion of four years of purchase.”

And clause 6:1

Disposal

6.1. All matters of vehicle disposal shall be administered by the group Human Resources.

6.2. The vehicle user will be given the first option to purchase the vehicle on disposal time. Purchase price will be set by the Executive committee reviewed as necessary...”

It is common cause that in 2011, the vehicle had reached “completion of four years of purchase” and that the appellant was dismissed in 2012. However, by the time of his dismissal, the respondent had neither made a decision to dispose of the vehicle nor offered the vehicle for sale to the appellant. The ownership of the vehicle, therefore, remained vested in the respondent. Upon his dismissal, which was not suspended by the appeal noted against it⁵, the appellant ceased to be an employee of the respondent and any former right acquired, by virtue of his employment, to possession of the vehicle for his use, also ceased.

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

⁵ Labour Act [Chapter 28:01] s92E (2)

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”.

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 conclusion, I would respectfully adopt the remarks by MTSIYA J in *FBC Bank Limited v Energy Deshe*⁶ that:

“... employers deserve the protection of the law from employees who take the law into their own hands as demonstrated by the respondent *in casu*.”

In the result, no claim of right having been established, the court *a quo* was correct in dismissing the application.

⁶HH285/11

The appeal is therefore dismissed with costs.

GWAUNZA JA: I agree

PATEL JA: I agree

Kantor & Immerman, applicant's legal practitioners

Venturas & Samukange, respondent's legal practitioners