

ZIMBABWE MANPOWER DEVELOPMENT FUND
versus
TICHAHLEYI MPOFU

HIGH COURT OF ZIMBABWE
MUSITHU J
HARARE, 17 June 2022 & 20 April 2023

Opposed matter – *Rei vindicatio* and authority to institute proceedings by a public entity

Mr M. Moyo, for the applicant
Mr T. Chagudumba, for the respondent

MUSITHU J: The applicant is a fund established under the Manpower Planning Development Act¹ (the Act). Its principal mandate is the development of skilled manpower in Zimbabwe. The respondent is a former employee of the applicant who was dismissed from employment for disciplinary reasons. As part of his conditions of service during the tenure of his employment with the applicant, the respondent had been issued with some assets which he did not surrender upon termination of employment. It is those assets that the applicant wishes to recover from the respondent through this application. The relief sought is set out in the draft order as follows:

- “1. Application for *rei vindicatio* be and is hereby granted.
2. Respondent be and is hereby ordered within 48 hours of the grant of this order, to deliver the following assets to the Applicant at No. 18572 Off Mother Patrick Ave, Rotten Row, Harare:-
 - i. ISUZU DOUBLE CAB DMAX registration number AFK1850
 - ii. HP Z BOOK (Laptop) 15 G6 serial number 5CD9473L72
 - iii. SAMSUNG GALAXY TAB A6 serial number R52K90WRP7T
 - iv. SAMSUNG GALAXY NOTE 10 PLUS serial number RF8N11VF1FH
3. The Respondent be and is hereby ordered to pay Applicant’s costs of suit at attorney-client scale.”

The application was fervently opposed by the respondent.

¹ [Chapter 28:02]

Background to the application and the applicant's case

The applicant's founding affidavit was deposed to by Sebastian Marume in his capacity as the applicant's Chief Executive Officer (CEO). He is also an *ex officio* member of the applicant's Board. He stated that at the time of deposing to the affidavit, members of the Board had not yet been appointed meaning that there was no Board to administer the applicant's affairs. He claimed that by virtue of him being the only Board member available, he had the requisite authority to depose to the founding affidavit on behalf of the applicant.

He summarised the applicant's case as follows. The respondent was employed by the applicant as Information Communication Technology Manager on 2 April 2012. As part of his conditions of service, he was issued with the assets listed in paragraph 2(i)-(iv) of the draft order above. It is not in dispute that the applicant is the registered owner of those assets. On 5 July 2021, the respondent was suspended from employment with full pay and benefits pending investigations into allegations of contravening section 4(a) of the Labour (National Employment Code of Conduct) Regulations, 2006. The respondent was found guilty of the alleged misconduct following a full disciplinary hearing. He was dismissed from employment on 23 September 2021. The memorandum incorporating the penalty reads in part as follows:

"The employee is requested to surrender all company assets and documents in his possession (if any) to the employer within 48 hours of receipt of the penalty."

That memorandum was communicated to the respondent's legal practitioners of record by the applicant's legal practitioners under cover of a letter dated 23 September 2021. Suffice to point out that the respondent appealed against his dismissal to the Labour Court under case number LC/H/468/21. He also approached the same court for a review of the disciplinary proceedings under case number LC/H/469/21. The applicant contends that those proceedings pending at the Labour Court are unrelated to the present application which was instituted on common law grounds.

The respondent did not comply with the request to surrender the applicant's assets. The applicant contends that the assets were availed to the respondent as tools of trade in terms of the contract of employment, as read with the applicant's Management Benefit Policy. For that reason, the respondent had no reason to continue holding on to those assets. It was on that basis that the applicant sought the aforementioned relief with costs on the punitive scale.

The Respondent's Case

The opposing affidavit raised two preliminary points at the outset. The first was that the application was invalid as the deponent to the applicant's founding affidavit did not have authority to depose to the affidavit on behalf of the applicant or to institute proceedings on behalf of the applicant. The second point was that the application was a nullity as the applicant had not complied with the provisions of s 124 of the Labour Act². That law seeks to guard against the unnecessary institution of multiple proceedings involving the same parties and the same cause. I shall revert to these preliminary points later in the judgment.

On the merits, the respondent made the following averments. The inclusion of the Samsung Galaxy Tab A6 amongst the assets sought to be recovered was malicious since it was lost through a theft at the respondent's home in 2020. The applicant was aware of that position since it was notified of the loss. A police report was made at Braeside Police Station. The police report record was in the possession of the applicant.

The respondent averred that the matters pending at the Labour Court had a bearing on the present matter. For instance if the review application succeeded, then the disciplinary proceedings would be set aside. The respondent further averred that at law one could withhold property or assets from the owner on the basis of some vested legal right enforceable against the owner. He claimed to have some contractual rights to the applicant's assets in his possession which justified his retention of those assets.

The respondent further averred that at any rate, the validity of the termination of his contract of employment was a contested issue. This court could not be called upon to determine on the respective rights of the parties, when the same rights were the subject of pending litigation before another court. By filing the present claim, the applicant had thus caused an unnecessary multiplicity of pleadings. The balance of convenience favoured the stay of the present matter pending the determination of the Labour Court matters.

THE SUBMISSIONS AND THE ANALYSIS

Before delving into the merits of the application, I will first determine the preliminary points raised by the respondent.

² [Chapter 28:01]

Invalidity of the application for want of authority to institute proceedings

The respondent's contention is that the deponent to the applicant's founding affidavit had no authority to institute the current proceedings in the absence of a resolution from the applicant's Board authorising him to act in that manner. The mere fact that the deponent was the applicant's CEO did not necessarily mean that he had the requisite authority.

Mr *Chagudumba* for the respondent submitted that the Manpower Planning and Development Act (Amendment Act 12 of 2020) (the Amendment Act) which amended the Act, created a board known as the Zimbabwe Manpower Development Board (the Board). The affairs of the applicant were thus vested in that Board in terms of the said Act as amended. It was the Board that had the power to sanction litigation. The CEO derived his authority from the Board. In the absence of a resolution from the Board, the deponent was therefore on a frolic of his own.

Mr *Chagudumba* further submitted that in terms s 48B of the Act, the Board of the applicant was constituted by five members including the CEO. The CEO was an *ex officio* member of the Board. He could only be a member of a properly constituted Board. There could not be a Board in the absence of other Board members as required by the law. It was therefore mindboggling for the deponent to allege that he was the only member of the Board and in the same breath state that there was currently no Board in place.

Mr *Chagudumba* further submitted that s 11(11) of the Public Entities Corporate Governance Act³ (the PECO Act), made it mandatory for statutory bodies like the applicant to have a Board. Counsel further submitted that the fact that the deponent to the applicant's affidavit had admitted that there was no Board settled the point. The deponent had failed to point to the source of his authority to cause the institution of the current proceedings.

In his replying affidavit, the deponent to the applicant's affidavit admitted that he was the only current member of the Board. A resolution was therefore not necessary. As the CEO responsible for managing the affairs of the applicant, recovering the applicant's assets, from whoever was in possession without the applicant's consent, was part of his responsibilities of managing the affairs of the applicant. The deponent dismissed the respondent's objection as a mere attempt to create a non-existent vacuum within the structures of the applicant.

³ [Chapter 10:33]

It was submitted on behalf of the applicant that the Board was already established by s 48B(1) of the Act. The deponent to the applicant's founding affidavit was the only Board member available at the moment. The applicant could not be allowed to be dysfunctional simply because the other Board members were yet to be appointed. In its heads of argument, the applicant further averred that the deponent could competently institute legal proceedings such as the application at hand without having to wait for other Board members to be appointed. It was not necessary for him to produce a resolution as proof of authority to act. His authority derived from the fact that he was the only Board member available. To support this proposition, reference was made to the dictum in *Madzivire v Zvarivadza & Ors*⁴.

In his oral submissions, Mr *Moyo* for the applicant argued that there was indeed a Board in existence for purposes of ss 48(B)(1) and (2) of the Act. Mr *Moyo* further argued that even assuming that there was no Board as submitted by the respondent, the deponent was the applicant's Accounting Authority for purposes of s 41 of the Public Finance Management Act⁵ (PFMA). In that capacity, he could exercise the powers of an Accounting Authority in terms of s42 (1)(2) of that Act. If the deponent had refrained from taking action as the CEO, then he would have acted irresponsibly and contrary to the provisions of that law.

The preliminary point is not only concerned about the issue of authority to represent a public entity in legal proceedings. It also raises an important corporate governance issue. In other words, in the absence of a Board, can a CEO of an organisation act unilaterally and make decisions that ordinarily would require a Board resolution, and in so doing claim that he had the requisite authority to do so by virtue of him being the only Board member available? The position of the law with respect to legal entities or companies formed in terms of the Companies and Other Business Entities Act⁶, was settled in *Dube v Premier Service Medical Aid Society & Another*⁷. The court followed the *ratio decidendi* in the earlier decision of *Madzivire & Ors v Zvarivadza & Ors*⁸, and explained the position of the law as follows:

“A person who represents a legal entity, when challenged, must show that he is duly authorised to represent the entity. His mere claim that by virtue of the position he holds in such an entity he is duly authorised to represent the entity is not sufficient. He must produce a resolution of the board of that entity which confirms that the board is indeed aware of the proceedings and that it has given such a person the authority to act in the stead of the entity. I stress that the

⁴ 2006 (1) ZLR 514 (S)

⁵ [Chapter 22:19]

⁶ [Chapter 24:31]

⁷ SC 73/19

⁸ 2006(1) ZLR 514 (S);

need to produce such proof is necessary only in those cases where the authority of the deponent is put in issue. This represents the current state of the law in this country.”⁹

The current position of the law therefore as reaffirmed in the *Dube* case is that when the authority of a person purporting to represent a legal entity is challenged, then that authority must be proved in the form of a resolution of the Board authorising him or her to institute or defend proceedings in the name of that entity. In its heads of argument, the applicant also cited the dictum in the *Madzivire & Ors v Zvarivadza* judgment where the court said:

“A company, being a separate legal person from its directors, cannot be represented in a legal suit by a person who has not been authorised to do so. This is a well-established legal principle, which the courts cannot be ignored. It does not depend on the pleadings by either party. The fact that the person is the managing director of the company does not clothe him with the authority to sue on behalf of the company in the absence of any resolution authorising him to do so. The general rule is that directors of a company can only act validly when assembled at a board meeting. As exception to this rule is where a company has only one director who can perform all judicial acts without holding a full meeting.” (Underlining for emphasis)

The exception to the requirement that directors of a company make decisions through resolutions passed at a duly constituted meeting of the Board, is with respect to a company that has one director. Such a director is considered to be the alter ego of the company and as such, he is expected to carry out all judicial acts without the need to convene a meeting of the Board. That was one of the reasons that the deponent pointed out to in justifying his conduct herein. He argued that as the sole Board member available, he could carry out those acts that a duly constituted Board would ordinarily undertake.

The position advocated by the applicant’s counsel is too simplistic when applied in the context of public entities or statutory bodies such as the applicant. The legislature has modified the common law position in respect of such statutory bodies by introducing a raft of measures through legislation. That legislation seeks to regulate the affairs of such entities, as well as nurture a culture of good governance, transparency and accountability in the management of public resources. The starting point is s 316 of the Constitution which provides in part as follows:

“An Act of Parliament must provide for the competent and effective operation of statutory bodies

⁹ At p 14 of the judgment

The Constitution attaches so much significance to the proper administration of public entities to the extent that the entire Chapter 9 of the Constitution entrenches principles of public administration and leadership in public entities.

THE RELEVANT LEGISLATION

The Manpower Planning and Development Act (The Act)

The Amendment Act introduced ss 48A and 48B to the main Act. Section 48B(1) establishes the Board of the applicant, while s 48B(2) sets out the composition of that Board. The Board is composed of at least a minimum of five members drawn from strategic institutions of society to reflect and give balance to the diversity of skills required for the proper administration of the applicant. The CEO is an *ex officio* member of the Board. In terms of s 47(4) of the amended Act, “*The Fund shall be administered by the Board, subject to this Act.*”. Section 2 of the Act defines “Fund” to mean the Zimbabwe Manpower Development Fund, the applicant herein.

The requirements of a properly constituted Board are set out in s 48B of the Act referred to in the preceding paragraph. The deponent himself, as the CEO is an appointee of the Board in terms of s 56(1) of the Act. That section states as follows:

“56 Appointment and remuneration of Chief Executive of Fund

(1) From amongst the persons employed in terms of paragraph (a) of subsection (2) of section *forty-eight* the Board shall appoint, on such terms and conditions as he may fix, a person to be the Chief Executive of the Fund.....”

The functions of the CEO are spelt out in s 57 (1) of the Act which reads:

“57 Functions of Chief Executive and other employees

(1) Subject to this Act the Chief Executive shall perform such of the Minister’s functions specified in subsection (2) of section *forty-eight* as the Board may delegate to him.

(2) With the consent of the Board, the Chief Executive may delegate any function which is vested in him un-der this Act to any other person employed in terms of paragraph (a) of subsection (2) of section *forty-eight* and, subject to subsection (4), the employee concerned may perform the function as if he were the Chief Executive.” (Underlining for emphasis).

Section 48(2) contains a list of activities that may be performed by the Board. It is from this list that the Board may delegate some of those activities or functions that the Board should ordinarily perform, to the CEO. The list of activities in s 48(2) runs from “a” to “u”, but I will confine myself to those that are relevant to this dispute. The material part of s 48(2) reads as follows:

“(2) In order to give effect to the object of the Fund described in section 47(2), the Board may, do any or all of the following—

- (a) employ such persons as may be necessary for the purposes of this Act;
- (b) administer the Fund and monitor the use of grants made to the Fund to ensure adherence to the purposes for which the fund is disbursed;
- (c)
- (f) pay any other cost, charge or expense which, in terms of this Act is to be made from the Fund;
- (l)
- (m) purchase, construct, take on lease or in exchange, hire or otherwise acquire, maintain, alter or repair, manage, work and control any movable or immovable property;
- (n.....” (Underlining for emphasis).

The Board can therefore delegate to the CEO, the powers to employ people, administer the Fund, as well as acquire movable and immovable assets and sell or dispose of such assets. It is the Board that primarily carries out those functions and where it has delegated such functions to the CEO, then that delegation has to be proved. Ordinarily, that delegation is done through a contract of employment which sets out the terms and conditions of employment, upon which the CEO’s performance is measured. Those terms and conditions can be express or they can be implied depending on the wording of the contract.

What also emerges from the above provisions of the law is that there is a demarcation between the Board and the CEO. The Board appoints the CEO even though he becomes an *ex officio* member of the Board upon assuming office. The fact that he sits in the Board by virtue of his position does not make him the Board, in the absence of the other Board members. It follows that if the deponent is going to rely on the Act as the source of his authority to act in the manner he did, then he must prove that the Board delegated to him by way of a resolution, those functions that the Board would ordinarily perform under s 48(2) of the Act. He cannot simply allege that because there is no Board, then he is competent to cause the applicant to institute the current proceedings. The Act does not give him the mandate to act in that manner.

The Public Entities Corporate Governance Act (PECOG)

The question that still remains is, in the absence of a properly constituted Board, how should the CEO deal with the issue of authority to institute or defend proceedings on behalf of the applicant. The respondent’s counsel drew my attention to s 11 (11) of the PECOGE which requires every public entity to have a Board. That section provides that where the number of Board members of a public entity falls below the number fixed by any law as a quorum of the Board, then the CEO of that public entity must immediately notify the line Minister in writing. The line Minister is required to take steps to fill the vacancies on the Board within 90 days from the date on which the Board’s membership fell below the quorum. If the line Minister fails to act as required within the 90 days, he is required to notify the Corporate Governance

Unit established by s 5 of that law. The Corporate Governance Unit was established in order to ensure compliance with principles good corporate governance by public entities as well as line Ministries under which those entities fall.

Still s 11(11) of the PECOG does not help to resolve the issue of authority before the Court, save to reaffirm the State's commitment to inculcate a culture of good corporate governance within public entities.

The Public Finance Management Act (PFMA)

Mr *Moyo*'s alternative argument was that in the event that the Court determined that there was no Board, then the deponent herein was permitted to act in the manner he did by ss 41(1)(2) as read with s44(1) of the PFMA Act.

The preamble to the PFMA sets out the objectives of the Act as: “...*To provide for the control and management of public resources and the protection and recovery thereof...; to provide for the regulation and control of public entities;; to provide for the examination and audit of public accounts; to provide for matters pertaining to financial misconduct of public officials;*”

Broadly speaking, the Act seeks to instil financial discipline and hygiene within the public sector in order to bring about transparency and accountability in the management of public resources. The object of the PFMA is set out in s 3 as follows:

“3 Object of Act

The object of this Act is to secure transparency, accountability and sound management of the revenues, expenditure, assets and liabilities of any entity specified in section 4(1).”

The scope of the Act is set out in s 4 as follows:

“4 Application of Act

(1) This Act, to the extent hereinafter indicated, shall apply to—

- (a) Ministries; and
- (b) designated corporate bodies and public entities; and
- (c) constitutional entities; and
- (d) statutory funds.

(3) In the event of any inconsistency between this Act and any other enactment, this Act shall prevail.”

Section 2 of the PFMA contains the following important definitions.

“**“public entity”** means—

- (a) any corporate body established by or in terms of any Act for special purposes;
- (b)

“**“public money”** means—

- (a) revenues; and
- (b) all other money received and held, whether temporarily or otherwise, by an officer in his or her official capacity;

“public resources” means public money and State property

Section 41 (2) of the PFMA establishes what are known as Accounting Authorities. It provides as follows:

“41 Accounting authorities

(1) Every public entity shall have an authority which shall be accountable for the purposes of this Act.

(2) If the public entity—

(a) has a board or other controlling body, that board or body shall be the accounting authority for that entity; or

(b) does not have a board or other controlling body, the chief executive officer or the person in charge of that public entity shall be the accounting authority for that public entity unless the enactment or memorandum and articles of association or foundational document relating to that public entity designates another person as the accounting authority.” (Underlining for emphasis)

There is no doubt that the applicant is a public entity as defined in s 2 of the PFMA. It therefore falls under the ambit of that law. The law requires every public entity to have an accounting authority whose responsibilities are set out in s 44 of the PFMA. Where the public entity has a properly constituted body, then the accounting authority is the Board. Where there is no Board, then the CEO of the entity becomes the accounting authority. Applying the law to the present case, it means that applicant’s CEO is the accounting authority for purposes of s 41(2) of the PFMA. Section 44 of the PFMA sets out the responsibilities of accounting authorities as follows:

“44 General responsibilities of accounting authorities

(1) An accounting authority for a public entity—

(a) shall ensure that that public entity establishes and maintains—

- (i) effective, efficient and transparent systems of financial and risk management and internal controls;
- (ii)

(c) is responsible for the management, including the safeguarding of the assets and revenue and expenditure and liabilities of the public entity;

(d)

(e) shall take effective and appropriate disciplinary steps against any employee of the public entity who—

- (i) contravenes or fails to comply with a provision of this Act applicable to such entity; or
- (ii) commits an act which undermines the financial management and internal control system of the public entity; or
- (iii) incurs or permits irregular expenditure or fruitless and wasteful expenditure;

(f)

(g) shall comply, and ensure compliance by the public entity, with the provisions of this Act and any other enactment applicable to the public entity.

(2) If an accounting authority is unable to comply with any of the responsibilities of an accounting authority under this Part, the accounting authority shall promptly report the inability, together with the reasons therefor, to the appropriate Minister and the Treasury.” (Underlining for emphasis).

The responsibilities of the accounting authority are quite expansive and include the safeguarding of the assets and revenue of the public entity. From my reading of the law, the requirement for management and safeguarding of assets and revenue of the public entity entails that the accounting authority must take such measures as are necessary to mitigate the risk of loss of assets and revenue of the public entity that they superintend over. It follows that by operation of this law, where assets of the public entity are in the hands of third parties who have no lawful basis to retain them, then the accounting officer is legally obliged to take all the necessary legal measures at his disposal to recover such assets on behalf of the public entity.

The same law recognises that there are instances where a public entity may not have a Board which must be the accounting authority for purposes of that law. In that case the CEO becomes the accounting authority in lieu of the Board. He is permitted to exercise those functions that ordinarily would have been exercised by a duly constituted Board as the accounting authority. The logic here is not difficult to comprehend. The absence of a Board should not result in the creation of a vacuum that may cripple the operations of the public entity. The affairs and the operations of the public entity must be allowed to continue whether there is a Board or there is no Board. That position accords with the letter and spirit of the law. It is also for that reason that s 42 of the PFMA creates certain fiduciary duties for accounting authorities.

The PFMA has therefore significantly altered the governance landscape in public entities. The absence of a Board cannot be used as an excuse for mismanagement of public resources. Accountability does not just end with the accounting authority, as s 45 of that law extends it to employees of public entities.

The provisions of the PFMA are intended to compliment any measures that already exist in the respective legislation that create such public entities. In the event of any inconsistency between that law and the provisions of the PFMA, then the provisions of the latter Act will prevail. A reading of s 48(2) of the Act may leave one with the distinct impression that in the absence of a proof of delegation by the Board of its powers to the CEO, then the CEO cannot exercise such powers. If the applicant had a Board at the material time that proceedings were instituted, then these questions would not have arisen. However, s 42(2)(b) of the PFMA was, in my view, intended to address the difficult position that the applicant and the CEO found themselves in, in the absence of a properly constituted Board.

The court determines that there is no inconsistency between the provisions of the PFMA and the Act because the provisions of the PFMA seek to fill in any gaps in the law that may cause operational challenges in the management of public entities in the absence of a Board. In other words, the challenges that would arise in the management of the affairs of the applicant owing to the absence of a board are addressed by the PFMA.

For the foregoing reasons, the court further determines that in terms of s 41(2) (b) and s 44 of the PFMA, the CEO of the applicant can institute or defend proceedings on behalf of the applicant without the need to produce a resolution as would be the position with a company. The aforementioned sections permit the CEO to take such measures as are necessary to safeguard the assets and revenue of the applicant as if it was the Board itself doing so.

So contrary to Mr *Moyo*'s earlier submission that the deponent was the Board by virtue of him being an *ex officio* member of the Board, the deponent could not have become the Board of the applicant for purposes of s 48B of the main Act. Rather he is legally permitted to exercise the functions of the Board within the confines of ss 41(2)(b) and 44 of the PFMA. The preliminary objection is therefore without merit and it is hereby dismissed.

Failure to comply with s 124 of the Labour Act

It was submitted on behalf of the respondent that the applicant's failure to comply with s 124 of the Labour Act rendered the application a nullity. That section states as follows:

“124 Protection against multiple proceedings

(1) Where any proceedings in respect of any matter have been instituted, completed or determined in terms of this Act, no person who is aware thereof shall institute or cause to be instituted, or shall continue any other proceedings, in respect of the same or any related matter, without first advising the authority, court or tribunal which is responsible for or concerned with the second mentioned proceedings of the fact of the earlier proceedings.”

The section seeks to guard against the multiplicity of proceedings in respect of the same or related matters. It was submitted on behalf of the respondent that the matters pending at the Labour Court involved the same parties. The applicant had since opposed both matters. The review application had an impact on the current proceedings in the event that it was granted and the disciplinary proceedings were quashed. The applicant was aware of the proceedings but had not disclosed the fact to this court.

In response, the applicant's counsel submitted that the point was without merit as the current application was not premised on the same cause as that relied upon by the respondent

in the two matters pending before the Labour Court. The Labour Court dealt with appeals and reviews in terms of the Labour Act.

The view of this court is that in determining the implications of s 124 of the Labour Act, the court must consider whether or not the cause of action in the pending matters is the same. If the cause of action is the same then it makes sense that the different matters be consolidated and heard at the same time, if they are pending before the same court. If the other matters are pending before a different court of different jurisdiction then it is proper that the court is informed of those pending proceedings to the extent that they have a bearing on the matter before that court. This is meant to avoid conflicting decisions in respect of those matters that are founded on the same cause.

The application before this court is based on the *actio rei vindicatio*, a common law remedy available to a party who seeks to recover his property which is in the hands of a third party without his consent. The matters pending at the Labour Court are concerned with the lawfulness of the termination of the respondent's contract of employment. In determining the *actio rei vindicatio*, the court is not concerned about the lawfulness of the termination of the respondent's contract of employment. That issue is not before this court. All that matters is that the respondent is no longer an employee of the applicant and he is holding on to assets that were issued to him in terms of a contractual of employment that has since been terminated.

The preliminary point is devoid of merit and it is hereby dismissed.

THE MERITS

Mr *Moyo* submitted that the employer's common law right to vindicate its assets from a dismissed employee was not affected by any pending litigation at the Labour Court. He further submitted that in the event that the respondent's appeal and review succeeded at the Labour Court, he was still not entitled to an automatic reinstatement as an employee. The law provided an option for damages in the event that reinstatement was no longer a possibility. Mr *Moyo* further submitted that in the event of the application succeeding, the applicant was prepared to abandon its claim for the Samsung Galaxy Tab A6, which is item 2 (iii) of the draft order. In his opposing affidavit, the respondent alleged that the Samsung Galaxy Tab was stolen and the applicant had been informed of the loss.

In response Mr *Chagudumba* decided to abide by the respondent's heads of argument. He however drew the attention of the court to the case of *Zimbabwe United Passenger*

*Company v Mashinge*¹⁰ cited in the respondent's heads of argument. In that case, the court reiterated the position of the law that upon the setting aside of employment disciplinary proceedings as a nullity, both the procedural and the substantive rights of the parties were restored to the position immediately before the nullified process. Where a dismissal was set aside as being a nullity, the employee was reinstated despite any further disciplinary processes that the court could order by way of a remittal or otherwise.

It is not in dispute that where disciplinary proceedings are set aside on review as a nullity, then the *status quo ante* must be restored. The parties are restored to their original positions as they were before the impugned proceedings. That position ensues only after the Labour Court has pronounced itself on the fate of the review application pending before it. Before it does so, the status of the employee remains that of a dismissed employee. This was the position when the parties appeared before me. The appeal and the review were pending at the Labour Court. The respondent therefore remains dismissed until such time the Labour Court pronounces otherwise.

The respondent finds himself in a very precarious position. The weight of case law authority in cases of this nature favours the employer, unless the dismissed employee pleads a right of retention or some contractual right to retain the employer's property. In the case of *Montclair Hotel & Casino v Farai Mukuhwa*, MATHONSI J (as he then was), citing the dictum in *Nyahora v CFI Holdings Private Limited*¹¹, explained the position of the law as follows:¹²

"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".

This is what the applicant has done in this matter. It is the owner of the property which was given to the respondent by virtue of an employment contract which has now come to an end. Whether the respondent is challenging the termination or not is immaterial, an owner is entitled to vindicate. The Supreme Court has confirmed a position long held by this court in respect of such matters. See Zimbabwe Broadcasting Holdings v Gono 2010(1) ZLR 8(H) 9G, 10 A-C; Medical Investments Ltd v Pedzisayi 2010(1) ZLR 111(H) 114C; DHL International Ltd v

¹⁰ SC 21/21

¹¹ SC 81/04 at p7-8

¹² HH 501/15 at page 3

Madzikanda 2010(1) ZLR 201(H) 204 B-D; *Moyo v Gwindingwi N.O & Anor* 2011(2) ZLR 368(H) 374A; *PG Industries (Zimbabwe) Ltd v Machawira* 2012(1) ZLR 552(H) 556B; *William Bains & Co Holdings (Pvt) Ltd v Nyamukunda* HH 309/13; *Steelmakers Zimbabwe (Pvt) Ltd v Mandiveyi* HH 479/15”. (Underlining for emphasis)

The current position of the law therefore is that the *actio rei vindicatio* remedy is available to an employer whose seeks to recover his assets that remain in the possession of a dismissed employee without the employer’s consent. As already stated, such claim can only be defeated by an employee who asserts some legal right to retain possession. The respondent herein attempts to explain his right to retain possession of the assets as follows¹³:

“It is common cause that if a Review application succeeds (my application has very bright prospects of success), the disciplinary proceedings will be set aside. It is also trite that a person may withhold a thing from the owner if s/he is vested with some right enforceable against the owner (e.g. a right of retention or a contractual right). In the present matter, I have a contractual right to the assets in issue and since the validity of the termination of my contract is yet to be decided, the present claim is premature.”

What is clear from the statement above is that the alleged right of retention of the assets is hinged on the outcome of the proceedings pending at the Labour Court. The respondent hopes that he will successfully challenge the termination of his employment contract and get to enjoy the use of the assets as an employee of the applicant. He does not allege any other legal right that entitles him to hold on to the assets as a dismissed employee. In the *Nyhora v CFI Holdings*¹⁴ judgment, ZIYAMBI JA had this to say of former employees in the respondent’s position:

“The ownership of the vehicle, therefore, remained vested in the respondent. Upon his dismissal, which was not suspended by the appeal noted against it¹⁵, 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.”

Even though the above sentiments were expressed in the context of a vehicle that was the subject of the *rei vindicatio*, they apply with equal persuasion herein. I associate myself with the views of the learned Judge. The respondent’s alleged rights are at best prospective and speculative. They are based on some anticipated favourable future outcome of proceedings that are pending before the Labour Court. Regrettably, that alone is not sufficient to ameliorate the untenable position that the respondent finds himself in on account of the position of the law. The applicant’s claim is unassailable and it must succeed.

¹³ Paragraph 14 of the opposing affidavit, p 49 of the record

¹⁴ Supra a p 8 of the judgment

¹⁵ Labour Act [*Chapter 28:01*] s92E (2)

COSTS

The applicant sought costs on the attorney and client scale in the event of the application succeeding. I see no reason to deny the applicant that relief. The position of the law is now settled in this jurisdiction that an employee who is dismissed from employment must surrender the employer's assets even if they are challenging their dismissal. Defending the *actio rei vindicatio* under those circumstances where the employer seeks to recover its assets from a dismissed employee is clearly an abuse of court process and is meant to buy time, unless the dismissed employee is able to point to some legal right which justifies such continued possession.

The respondent failed to justify his continued retention of the applicant's assets despite being requested to surrender them following his dismissal from employment. He suffers no prejudice if he surrenders those assets to the applicant. It is not as if he has no other legal remedy in the event that he succeeds at the Labour Court.

DISPOSITION

Accordingly it is ordered as follows:

1. The application for the *actio rei vindicatio* be and it is hereby granted.
2. The respondent be and is hereby ordered within 48 hours of the grant of this order, to deliver the following assets to the applicant at No. 18572 Off Mother Patrick Avenue, Rotten Row, Harare:-
 - i. ISUZU DOUBLE CAB DMAX registration number AFK1850
 - ii. HP Z BOOK (Laptop) 15 G6 serial number 5CD9473L72
 - iii. SAMSUNG GALAXY NOTE 10 PLUS serial number RF8N11VF1FH.
3. The respondent shall pay the applicant's costs of suit on the legal practitioner and client scale.

Dube-Banda, Nzarayapenga & Partners, legal practitioners for the applicant
Atherstone & Cook, legal practitioners for the respondent