

**RETINUE STARS INVESTMENTS (PVT) LTD
t/a OLD NIC MINE**

Versus

LYTON NDLOVU & 53 OTHERS

IN THE HIGH VOURT OF ZIMBABWE
MANGOTA J
BULAWAYO 14 NOVEMBER 2023 AND 7 MARCH 2024

Opposed Application

K Mpofu, for the applicant
S. Nkomo, for the respondents

MANGOTA J:- I heard this matter on 14 November, 2023. I delivered an *ex-tempore* judgment in which I granted the application as prayed in the draft order.

On 29 November, 2023 the respondent wrote a letter to me requesting reasons for my decision. These are they:

The applicant is the successor-in-title to the respondents' former employer, Olympus Gold Mine (Pvt) Ltd trading as Old Nic Mine ("Old Nic Mine/the mine"). In 2015, the mine encountered serious financial challenges which made its operations unviable. To avoid its liquidation which would have led to its workers having their contracts terminated, it, in consultation with the Works Council, agreed that it be placed on 'care maintenance' in terms of which it would cease to operate but retain a skeletal staff which would provide security and safety at the mine. Workers who were not part of the skeletal staff were placed on unpaid leave with the intention that, if the situation improved, they would return to work. It took that measure in agreement with the affected employees, the respondents included. The affected workers stopped working and they ceased to receive their salaries and/or wages.

In September, 2016 the applicant purchased the mining business from Old Nic Mine. It undertook to employ the mine's former workers. Its undertaking was premised on the condition that the workers would not claim from it any money which was due to them from Old Nic Mine for the period that they were on unpaid leave. A majority of the mine's former workers agreed to the condition. They were therefore re-engaged and their contracts of employment taken over and carried forward by the applicant.

The respondents did not agree to the condition which the applicant proposed to others and them. The applicant refused to re-engage them. They, however, continued to occupy the houses which the mine allocated to them in terms of their employment contracts with it. The position which they took made the applicant to take the view that they ceased to be its employees. The view which it took persuaded it to evict them from the houses which they were/are in occupation of in terms of their contract with the applicant's predecessor. It, accordingly, served notices upon them to vacate the houses which they are occupying at the mine. The respondents refused to leave the houses in question. Their posture compelled the applicant to file this application. It moves me to order the respondents to vacate its properties within forty-eight (48) hours of the court's order failing which the Sheriff would be authorized to evict them from the same.

The respondents oppose the application. They maintain that the contracts which they concluded with the mine remain binding between the applicant and them. They aver that their occupation of the houses which the mine allocated to them is lawful. They insist that their contracts have not yet been terminated in terms of the law. It is their statement that the applicant took over all the obligations of its predecessor. They state that its effort to impose a condition of re-engagement upon them is both unlawful and a nullity. They allege that they are within their right to resist the purported imposition of conditions. They aver that they remain employees of the applicant until their contracts of employment are lawfully terminated. They state that the houses which were allocated to them came with their employment contracts. They insist that their contracts are still extant and that there is therefore no basis for them to be evicted from the houses. It is their statement that the applicant approached the National Employment Council with a view to dismissing them from work. The matter, they claim, is pending finalization. The applicant, they insist, is approbating and reprobating in the sense that it alleges, on the one hand, that they are not its workers and, on the other, that they should be

dismissed from work. They move me to dismiss the application with costs which are at attorney and client scale.

The case which the parties placed before me traverses two very important components of the law of contract, its general principles in particular. These are:

- i) the meaning and import of the phrase ‘contract of employment’ – and
- ii) the remedy of *rei vindicatio*.

Section 2 of the Labour Act (Chapter 28:01) (“the Act”) is relevant to the resolution of the parties’ dispute. It defines the word ‘employee’ to refer to any person who performs work or services for another person for remuneration or reward on such terms and conditions as agreed upon by the parties or as provided for in the Act. The section, no doubt, places the dispute of the parties into context.

The context is further clarified in *Colonial Mutual Life Assurance Society Ltd v Macdonald*, 1931 AD 412 in which it was stated that:

“One thing appears...beyond dispute and that it is that the relation of master and servant cannot exist where there is total absence of the right of supervision and controlling the workman under the contract, in other words, unless the master not only has the right to prescribe to the work place what work has to be done, but also the manner in which such work has to be done”.

Section 12 (1) of the Act comes in neatly to cement the above-observed concepts as they relate to employment contracts. It reads:

“Every person who is employed by, or working for, any other person and receiving or entitled to receive any remuneration in respect of such work shall be deemed to be under a contract of employment with that other person, whether such contract is reduced to writing or not”.

Lovemore Madhuku gleans three essential elements which stand out in any valid contract of employment. These, as stated by the learned author in his *Labour Law in Zimbabwe*, page 31 are:

- a) agreement to make personal services available;
- b) remuneration- and
- c) subordination.

It follows, from the above-stated matter, that any work-related contract which lacks any of the three elements which go into the contract of employment cannot have the relationship of the parties fall under the definition of an employment contract. It may be some undefined relationship. But it certainly is not a contract of employment which the foregoing provisions of the Act and the cited case authority have defined.

The question which begs the answer in the context of this case is whether or not the respondents are employees of the applicant. They allege that they are. They premise their claim on the fact that the applicant took over the business of its predecessor and, therefore, the latter's obligations. The applicant's statement, on the same point, is to the contrary. It insists that the respondents do not work for it. It states that they refused to work for it.

The applicant, it is common cause, took over the mine from Old Nic Mine in 2016. Its statement is that the respondents did not avail their services to it from the time that it set foot at the mine to the date that it filed this application. It filed the application in 2022.

Simple mathematical calculation shows that the respondents have not worked for the applicant for six (6) years running. The applicant, on its part, has not given work to them for the stated duration. Nor has it paid any salaries or wages to them for the mentioned period of time. The relationship of the parties cannot, by any stretch of imagination, be regarded as that of employer and employee. It falls outside the defined pieces of legislation I made reference to, the case authority I was pleased to cite and the contents of the learned author's work. There is, in short, no relationship, at all between the parties.

The respondents' allegation which is to the effect that they have an employment contract with the applicant is misplaced. Misplaced in the sense that none of them, according to evidence filed of record, made any effort to reach out to the applicant with a request to the latter to place him on duty. They state, in clear and categorical terms, that they refused to be re-engaged on the applicant's condition(s). They allege that, because the applicant purchased the mine as a going concern, it assumed all of its predecessor's obligations.

What the respondents fail to appreciate is that the obligations which the applicant assumed from their predecessor remain unknown to them. They do not state that they were privy to the discussion of the applicant and its predecessor. What they also fail to appreciate is that, when the applicant placed the condition of re-engagement with them, it was creating new contracts

with their co-workers and them which they had either to accept or reject. Their rejection of the applicant's offer to them terminated their employment relationship with it. The essential elements of a contract-offer and acceptance- failed to ripen into a contract between the applicant and them. Further, on the papers filed of record, the respondents and their co-workers who accepted the applicant's condition and were re-engaged, agreed with the applicant's predecessor to go on unpaid leave and to return to work when viability at the mine had successfully been restored.

The respondents are the authors of their own fate. They refused to work for the applicant for more than six consecutive years. They, in the process, terminated the contract of employment which they claim to have had with the applicant. They did so by their conduct. They repudiated the contract if such was ever in existence. Repudiation occurs where one party to a contract, without lawful grounds, indicates to the other by word or conduct an unequivocal intention that he no longer intends to be bound by the contract: *Ilasha Mining (Pvt) Ltd v Yakatala Trading (Pvt) Limited*, HB 9/20.

That the applicant owns the houses which the respondents are in occupation of requires little, if any, debate. As owner, therefore, it has every right to vindicate its property from whoever is holding the same against its will. The stated position is the corner-stone of the Law of Property. The remedy of *actio rei vindicatio* was stated in many text – book writers of law as well as in decided case authorities. Silberberg & Schoeman, for instance, state in their *Law of Property*, 3rd edition, page 273 that:

“The principle that an owner cannot be deprived of his property against his will means that he is entitled to recover it from any person who retains possession of it without his consent”.

The same principle was expressly stated in *Stanbic Finance Zimbabwe Ltd v Chivhungwa*, 1999(1) ZLR 262 (H) wherein it was remarked that:

“The principle on which the *actio rei vindicatio* is based is that an owner cannot be deprived of his property against his will and that he is entitled to recover it from any person who retains possession of it without his consent.” (see also *African Sun Zimbabwe (Pvt) Ltd v Sifelani Mhlongone*, HH 332/15 and *Savanhu v Hwange Colliery Company*, SC 8/2015).

That the respondents are holding onto the applicant's houses without the latter's consent requires little, if any, debate. The notice(s) to vacate the property which the applicant served on each respondent in December, 2021 and January, 2022 are evidence of the stated matter. The substance of the contents of the notices is the same. It is to the effect that the applicant

wants to make full use of its property and that it requests the occupant/ respondent to vacate the same by a given date.

The application for the remedy of *rei vindicatio* is not misplaced. It is, if anything, within the right of the applicant to apply as it did. Whilst the roots of this case are steeped in the contract of employment as the respondents correctly claim, what the parties placed before me is a pure contract which is governed by the general principles of the law of contract. The same dispute stretches itself to the law of property and the principles which relate to that branch of the law remain applicable to the resolution of the parties' dispute.

The applicant proved its case on a preponderance of probabilities. The application is, accordingly, granted as prayed in the draft order.

Webb, Low and Barry Inc. Ben Baron & Partners, applicant's legal practitioners
Mathonsi Ncube Law Chambers, Respondents' legal practitioners