

NATIONAL PHARMACEUTICAL COMPANY (PVT) LTD
versus
WALTER NHAU

HIGH COURT OF ZIMBABWE
MUCHAWA J
HARARE, 31 January and 18 March 2022

Opposed Matter

O Kondongwe, for the applicant
T M Kanengoni, for the respondent

MUCHAWA J: This is an application for *rei vindicatio* made in terms of common law. The following draft order is sought:

1. “The application *for rei vindicatio* be and is hereby granted.
2. The respondent be and is hereby ordered to surrender the Mazda BT50 motor vehicle registration number AFF 1103 to the applicant’s offices within forty-eight (48) hours of this order.
3. In the event that respondent fails to comply with the order in (2) above, the Deputy Sheriff be and is hereby empowered to seize from the respondent and deliver to the applicant the Mazda BT50 motor vehicle registration number AFF 1103 without notice.
4. Should the application be opposed, respondent shall pay costs of suit on an attorney and client scale.”

It is common cause that the respondent was employed by the applicant in terms of a fixed term contract which was to lapse on 31 December 2024, in the capacity of human resources manager. On the 14th of July 2020, the respondent was served with a notice of termination of employment contract in terms of s 12(4a) (c) of the Labour Act, [*Chapter 28:01*], as read with his employment contract. On the 27th of October 2020, the respondent referred to conciliation before, a labour officer, his complaint of unfair dismissal. That matter is still pending. It appears from supplementary affidavits filed in this matter, that a meeting was held on 26 May 2021, between the applicant and the respondent which explored the possibility of reinstatement and withdrawal

of all pending cases. Nothing came out of it as the respondent's post was then advertised on 7 November 2021 and respondent applied to resume duty.

It is the applicant's case that it is the owner of the vehicle in issue which was only availed for use by the respondent in furtherance of the employer's interests during his employment. It was submitted that since the respondent's contract of employment had been terminated, his entitlement to possess and use the vehicle had ceased and he was bound to surrender it. It was argued that as the owner, the applicant had a vindicatory right against the whole world, respondent included.

In opposition, the respondent took a point *in limine* that the High Court has no jurisdiction, in the first instance, to deal with this matter which jurisdiction lies with the Labour Court in terms of s 89 (6) of the Labour Act. I heard the parties on this point and on the merits and reserved my judgment. This is it, starting with the point *in limine*.

Whether the High Court has jurisdiction to deal with this matter

Mr *Kanengoni* submitted that since the motor vehicle in issue came into the respondent's hands by virtue of his employment contract, whose termination has been challenged, this is a pure labour matter which falls within the purview of s 89 (6) of the Labour Act and the High Court's jurisdiction in the first instance is ousted. Reference was made to the case of *Stanley Nhari v Robert Gabriel Mugabe & 2 ORS* SC 161/2020 as having clarified this position in the face of conflicting High Court decisions. The effect of this decision was said to be the qualification of the inherent jurisdiction of the High Court granted by s 171 of the Constitution of Zimbabwe, 2013. It was argued that precedence is to be given to the specialized courts whose jurisdiction for the Labour Court is circumscribed in s 172 of the Constitution as read with s 89 (6) of the Labour Act.

In support of resolving the question of the applicability of s 89 (6) when one seeks vindicatory relief, the Court was referred to the case of *DHL International (Pvt) Ltd v Madzikanda* 2010 (1) ZLR 201 (H) wherein it was held that the clear intention of the Legislature should be upheld and that the jurisdiction of a special court should not be ousted by the mere framing of disputes into common law causes of action where the Act has made specific provisions for the same. It was pointed out that the court observed the existence of concurrent jurisdiction and leaned in favour of the statutory provision.

Further reference was made to the case of *Lazarus Muchenje v Susan Mutangadura & ORS* HH21/21, to argue that the court should look beyond the relief sought and go into the substance of

the application, in order to decide whether the dispute is one falling under common law or otherwise. Paragraph 8 of the founding affidavit was alleged to make it clear that possession of the motor vehicle was consequent to the employment relationship and that in paragraphs 9 and 10 the basis for requesting the vehicle is termination of the employment relationship. Mr *Kanengoni* argued that the real cause of action is the termination of employment therefore the Labour Court should be the one holding jurisdiction in deference to the *Nhari v Mugabe supra* judgment.

Mr *Kondongwe* submitted that the respondent is selectively reading the *Nhari v Mugabe supra* case as it is distinguishable from the facts *in casu* as Nhari approached the Court for an order to be paid terminal benefits after termination of his contract and the court was correct to decline jurisdiction of the High Court as the cause of action fell within the purview of the Labour Court's jurisdiction.

The *Muchenje v Mutangadura supra* case was also distinguished as one where the applicant wanted an interdict but the court found that the real cause of action was a challenge to his dismissal. It was argued that the court correctly found it had no jurisdiction but the Labour Court had, as the cause of action was not based on common law principles as herein.

Mr *Kondongwe* referred to the case of *Nyahora v CFI (Pvt) Ltd SC 81/14*, which, it was contended falls on all fours with this case and settled all the conflicting High Court cases. In that case the Supreme Court is said to have distinguished the applicability of the line of cases like *Nhari v Mugabe* by finding that the Labour Court is a creature of statute and its jurisdiction is set out in s 89 of the Labour Act. The exclusive jurisdiction set out in s 89 (6) is said to be applicable only to matters covered in the Labour Act which is said not to cover the common law principle of *rei vindicatio*. It was further argued that the right of an individual to approach the High Court seeking relief other than relief specifically set out in s 89 (1) of the Labour Act has not been abrogated.

Furthermore, Mr *Kondongwe* observed that the applicant's counsel had not distinguished the case of *Nyahora v CFI supra* and that the Supreme Court, in the case of *Nhari v Mugabe supra*, in its wisdom, had also not ventured into dealing with *Nyahora v CFI supra*. The only logical conclusion, it was argued, is that *Nhari v Mugabe* did not depart from *Nyahora v CFI* and that in the former case, the Supreme Court simply sought to protect the High Court from general labour matters being brought to this forum on account of inherent jurisdiction.

What is evident from case law is that before the Supreme Court case of *Nyahora v CFI supra*, one could be forgiven if they followed the *DHL International (Pvt) Ltd v Madzikanda supra* line of cases where an employer sought to recover its property from an employee upon termination of the contract of employment and declined jurisdiction and referred such a dispute to the Labour Court. The justification was that it would be a mockery of the clear intention of the legislature to create a special court in circumstances where the jurisdiction of the court could be defeated by the framing of disputes as common law causes of action despite the fact that the Labour Act would have made specific provision for the same.

The Supreme Court in *Nhari v Mugabe supra* considered the case of *Stanley Machote v Zimbabwe Manpower Development Fund* 2016 (1) ZLR 195 (H) whose subject was the registration of an arbitral award. Also considered was the case of *Nyanzara v Mbada Diamonds (Pvt) Ltd* 2016 (1) ZLR 195 (H) in which the issue was outstanding allowances. In *Triangle Limited & Three Others v Zimbabwe Sugar Milling Industry Workers' Union and Three Others* HH 74/16 the subject was a collective job action. In *Nhari v Mugabe* the Supreme Court observed that the claim was for outstanding pay though it had been called damages. The court did not expressly deal with *rei vindicatio* claim nor distinguish its earlier decision in *Nyahora v CFI supra*. The only mention of the cases of *DHL International (Pvt) Ltd v Madzikanda supra* and *Zimtrade v Makaya* 2005 (1) ZLR 427 (H) 429 which cases dealt with *rei vindicatio* claims was to show that before the current Constitution, the position was settled that the High Court had no jurisdiction in labour and employment matters as shown in those cases. The Supreme Court did not go further to consider the implications of *Nyahora v CFI* in as far as it dealt with a *rei vindicatio* claim. It is my finding therefore that there has been no departure from *Nyahora v CFI supra* in which the position of the law was clearly set out as shown hereunder;

“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 Act. These are applications in terms of the Act and no other court has jurisdiction to hear or determine such applications at first instance.-----

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.”

It is therefore my finding that the High Court has jurisdiction to deal with this matter as the common law remedy of *rei vindicatio* is not covered under the Labour Act. I therefore dismiss the point *in limine*.

Whether the respondent has a right to retain the motor vehicle

Mr *Kondongwe* submitted that the applicant relies on the *actio rei vindicatio* and it is trite that an owner has a right to vindicate his property against a possessor who holds it without his consent. The requirements to be proved are that the applicant is the owner of the property which the respondent is holding against his or her will. Once this is shown, it was averred that the onus shifts to the respondent to prove a right of retention. It was submitted and is not disputed that the vehicle in issue is owned by the applicant.

In his defence, the respondent submitted that his dismissal was improper and has been challenged before the labour officer. He also sought to rely on the promise of reinstatement which was intimated in the meeting of 26 May 2021, which meeting, it was argued was at the instance of the applicant. He therefore further argued that he had a legitimate expectation of reinstatement as his post had not yet been filled at the time of the hearing of this matter.

The claim of a legitimate expectation is just that. An expectation. It does not give rise to any contract of employment entitling the respondent to retain the vehicle. See *Nyahora v CFI* where a claim for legitimate expectation to purchase the company vehicle was dismissed in the following manner,

“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.”

Mr *Kanengoni*’s further argument that the dismissal has been challenged, is also without merit. I rely on what was held by MATHONSI J in *Lafarge Cement Zimbabwe v Chatizembwa* HH 413/18

“I have stated before that an employee who has lost employment has no right to hold onto the property of the former employer allocated to him or her by virtue of employment or as a condition of employment merely on the grounds that he or she is challenging the termination of the employment contract.-----

Put in another way, a former employee does not acquire a right of retention as can be used to resist a *rei vindicatio* on the basis of a challenge of a completed dismissal from employment and a forlorn hope that such dismissal may be reversed at a future uncertain date”

It is my finding that the respondent has not discharged the onus to show a right of retention of the motor vehicle in issue.

Costs

It was submitted for the applicant that the question of the retention of benefits by dismissed employees is a weather-beaten road and the courts have stressed that such actions are unlawful. It was argued that the defences mounted by the respondent have been traversed before and defending the claim was a clear attempt to flog a dead horse thereby merely frivolous and costs should be awarded on a higher scale.

What is apparent however is that the respondent based his defence on the case of *Nhari v Mugabe* which was decided in 2020 and in which the Supreme Court broadly stated the issue for determination as, “whether the High Court has jurisdiction to deal with matters of labour and employment” The court reached the conclusion that the High Court does not enjoy the jurisdiction to deal with each and every civil and criminal matter in Zimbabwe and that its original jurisdiction had been fettered and truncated by the Constitution in making provision for the creation of specialized courts whose jurisdiction may oust that of the High Court in specific areas. The question of whether the *Nhari v Mugabe* decision had specifically replaced *Nyahore v CFI* remained unchartered. The defence cannot be said to be frivolous therefore and costs on a higher scale are unmerited.

Consequently, I make the following order;

1. The application *for rei vindicatio* be and is hereby granted.
2. The respondent be and is hereby ordered to surrender the Mazda BT50 motor vehicle registration number AFF 1103 to the applicant’s offices within forty-eight (48) hours of this order.
3. In the event that respondent fails to comply with the order in (2) above, the Deputy Sheriff be and is hereby empowered to seize from the respondent and deliver to the applicant the Mazda BT50 motor vehicle registration number AFF 1103 without notice.
4. The respondent to pay costs of suit on an ordinary scale.

Dube, Manikai & Hwacha, applicant’s legal practitioners
Messrs Nyika, Kanengoni & Partners, respondent’s legal practitioners