

FREDA REBECCA GOLD MINE
versus
CANAAN JACK

HIGH COURT OF ZIMBABWE
CHINAMORA J
HARARE, 16 May 2022 and 21 October 2022

Civil trial - stated case in terms of Rule 52

Mr T Sena, for the plaintiff
Mr C Chakawa, for the defendant

Introduction.

Before me is an action for eviction of the defendant by the plaintiff. These proceedings were brought to court as a stated case in terms of rule 52 of the High Court Rules, 2021. The facts giving rise to the dispute *in casu* are that on 1 December 2009, the plaintiff and defendant entered into the employment contract, which appears on pages 1-5 of the consolidated bundle of documents. Clause 10 of this contract reads as follows:

“The employee will have the benefit of an unfurnished company house, if a house is available and at the discretion of management. The employee will be required to sign a lease agreement. In the event of the termination of services of the employee (resignation, absconding, dismissal or related termination), the employee will have tenure of 1 (one) calendar month from the date of termination upon which the employee must vacate the company house as per the lease agreement and the terms and conditions thereof”.

Additionally, the said contract stipulates that the terms and conditions of this benefit are available in the plaintiff’s housing policy which, *inter alia*, provides that:

“At all times, the responsibility to find accommodation shall lie with the employee, such that it is not a contractual obligation of the employer to provide houses to employees”.

In accordance with the terms of the contract, the plaintiff gave defendant its property known as No. 5 Zororo Park, Bindura, for use as accommodation in 2020. Disciplinary proceedings were commenced against the defendant, who was found guilty of the charges preferred against him. The plaintiff’s appeals committee upheld the decision on 27 March 2020. The defendant then filed an application for review in the Labour Court. The review succeeded and an order for reinstatement and damages in lieu of reinstatement was granted in favour of the

defendant under LC/H/212/21. On the strength of this judgment, the defendant reported for work, but the plaintiff neither took him back nor offered damages. Unhappy with the Labour Court outcome, the plaintiff sought leave to appeal, and also gave the defendant notice to vacate its property on 6 August 2021. He did not leave, prompting the plaintiff to issue eviction summons. When the parties appeared before me, they agreed that the matter proceeds as a special case, and filed a statement of agreed facts with the following issues:

- i. Whether or not this court has jurisdiction to determine the matter.
- ii. Whether or not the plaintiff is entitled to evict the defendant and all those claiming occupation through him from No. 5 Zororo Park, Bindura, despite his reinstatement.
- iii. Whether or not the plaintiff's right to vindicate is subject to the determination of the defendant's contract of employment.
- iv. Whether the Labour Court judgment assists the defendant's defence in *casu*.

The applicable law

The position of the law is very clear in instances where the jurisdiction of this court is questioned. First and foremost, it must be stated that the High Court has inherent jurisdiction to deal with all matters that it is not precluded by specific legislation from hearing. This was clarified by DUBE J (as she then was) in *Derdale Investments Private Limited v Econet Wireless and Ors* HH656-14, where the learned judge explained:

“Inherent power is unwritten power which superior courts are endowed with. Inherent power gives the court wide ranging and all-embracing powers to deal with any matter that may be placed before them. This means that a court of inherent jurisdiction has default powers which it can exercise in the absence of express power and can deal with all areas of the law and all procedural matters involving the administration of justice”.

See also *Martin Sibindi and Anor v Benson Chinemhute* HH131-04

The current action is a *rei vindicatio*, and the defendant pleaded that this court has no jurisdiction, since the dispute emanates from a contract of employment. The answer was provided in *Nyahora v CFI Holdings* SC 81-14. The Supreme Court had to decide whether an employee, whose contract has been ended, could retain the company car, pending resolution of his appeal against the termination. ZIYAMBI JA held that *rei vindicatio* is an action under common law, and s 89 of the Labour Act [*Chapter 28:01*] does not confer the Labour Court to deal with such jurisdiction. Pertinently, the learned judge asserted the position of the law:

“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 apparent from the above enunciation of the law, that jurisdiction vis-à-vis the remedy of *rei vindicatio* lies within the purview of the High Court. Clearly, the defendant’s reliance on a plea of lack of jurisdiction is misplaced and an obvious misunderstanding of the law. Let me now deal with the requirements of an *actio rei vindicatio* to succeed in the context of an employment dispute. The position was succinctly elucidated by CHAREWA J in *Forestry Commission v Betty Muwonde* HH 9-18 as follows:

“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, 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 ... 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.”

I unreservedly associate myself with these observations. Having done so, I will move on to examine whether the law allows the plaintiff to evict the defendant and all those claiming occupation through him. As already pointed out in the *Nyahora case supra*, s 89 (6) of the Labour Act does not take away an employer’s or employee’s right to seek relief in this court based on the application of pure principles of civil law. For example, in *Savanhu v Hwange Colliery* SC 8-15 ZIYAMBI JA explained the remedy of *rei vindicatio* as follows:

“The *actio rei vindicatio* is an action brought by an owner of property to recover it from any person who retains possession of it without his consent. It derives from the principle that an owner cannot be deprived of his property without his consent ... The owner, in instituting a *rei vindicatio*, need, therefore, do no more than allege and prove that he is the owner and that the defendant is holding the *res* - the onus being on the defendant to allege and establish any right to continue to hold against the owner... (cf. *Jeena v Minister of Lands*, 1955 (2) SA 380 (AD) to pp 382E, 383)...”

¹
The defendant, in this case, argues that his right of retention emanates from the employment contract. However, the actions of the plaintiff make it apparent that they no longer wish to be bound by that contract as evidenced by their refusal to reinstate the defendant. It is relevant to

look at *Larfage Cement Zimbabwe Ltd vs Chayizambura* HH-413-18, where it was reiterated that the relief of *actio rei vindicatio* is enforceable against the whole world. The decided cases are clear that the right to vindicate the property does not emanate from the contract of employment. Rather, the right is hinged on the plaintiff's ownership of the disputed property. Put differently, where a defendant fails to prove a legal right of retention the matter ends there, and they have no defence against an *actio rei vindicatio*. Since the matter before me is a stated case with no *viva voce* evidence from the parties, I shall decide the issues based on the pleadings and agreed facts. Let me now examine each issue in turn.

Whether the High Court has jurisdiction to hear the matter

Given the position of the law that has been set out earlier, I am in no doubt that the plaintiff approached the right forum for the enforcement of its rights. The defendant has not placed anything placed before me which ousts the jurisdiction of the High Court. In that regard, find no merit in the defendant's plea of lack of jurisdiction.

Whether the Plaintiff is entitled to evict the Defendant and those claiming through him

Having regard to the requirements of *rei vindicatio*, dealt with already, I am satisfied that the plaintiff has established a case for eviction of the defendant and anyone claiming occupation through him. There is no dispute and, in fact, it is part of the agreed facts that the plaintiff is the owner of the property occupied by the defendant. Ownership is an essential requisite in an *actio rei vindicatio*. The plaintiff drew the court's attention to clause 1 of the Housing Policy, which is on p 7 of the consolidated bundle of documents. An examination of this clause explicitly shows that the plaintiff does not have a contractual obligation to provide houses for the employees. On the contrary, the contract mentions that the provision of such a benefit is at the discretion of management. In other words, management is at liberty when to offer the benefit and when to withdraw it. Clause 14 of the Housing Policy (on p12 of the consolidated bundle of documents) has not escaped my attention. It is evident the defendant can remain in the property for only one calendar month after termination of employment. The defendant has not raised a valid defence to the eviction lawsuit, and has no legal right of retention. As the plaintiff has managed to satisfy the requirements for *rei vindication*, I am inclined to grant the relief sought.

Issue of costs

Generally, costs follow the result. The plaintiff has claimed costs on an attorney and client scale, and I see no reason in not awarding the punitive costs. The employment agreement between the parties gave the defendant the benefit of occupying a property of the plaintiff in terms of a lease agreement. That contract was clear that the plaintiff had no obligation to provide houses to employees and, in addition, it expressly said that the provision of housing was at the discretion of management. Thus, there was no basis for the claimed right of retention and no need to resist the eviction claim. I found it necessary to censure the defendant's conduct by an award of costs at the higher level of attorney and client.

Disposition

In the result I make the following order:

1. The defendant and all those claiming occupation through him shall vacate the property known as No. 5 Zororo Park, Bindura, together with all their goods and chattels, within seven (7) days from the date of service of this order on him, failing which, the Sheriff of Zimbabwe or his lawful deputy with such officers of the Zimbabwe Republic Police as he may require shall eject the defendant aforesaid together with all persons claiming occupation through him from the said property.
2. The defendant shall pay costs of suit on an attorney and client scale.

Chimuka Mafunga Commercial Attorneys, plaintiff's legal practitioners
Tamuka Moyo Attorneys, defendant's legal practitioners