

LISTERFILL ENTERPRISES (PVT) LTD**Versus****WILSON MARTIN SEZI**IN THE HIGH COURT OF ZIMBABWE
TAKUVA J
BULAWAYO 6 & 18 MAY 2017**Urgent Chamber Application***T. Masiye-Moyo* for the applicant
Respondent in person

TAKUVA J: This is an urgent application for a *rei vindicatio*. The respondent was employed as applicant's marketing director on a three year fixed term contract with effect from the 6th day of February 2017. Applicant was issued with a company vehicle and a laptop for use at work. Relations worsened culminating in respondent being suspended from his position pending investigations into allegations of defrauding his employer among other allegations. Upon his suspension on 12 April 2017, respondent was ordered to surrender the motor vehicle and the laptop. Respondent was unco-operative. Subsequently, a hearing was conducted in terms of which respondent was dismissed from his employment with effect from the 12th of April 2017. When respondent failed to return the applicant's property, the later filed a police report of theft at Mzilikazi Police Station under CR 116/04/17. Between the 12th and the 20th April 2017, applicant's legal practitioner and the police visited the respondent's place of residence but he was not present. Meanwhile the respondent, who was miffed by the visit, filed case number HC 1067/17 with this court praying for an interdict against the police and justifying his possession of the property.

Applicant received a report from one of its officials Lawrence Cleminson that respondent had approached Quest Motors the supplier of the applicant's vehicle, seeking to have the registration book of the vehicle changed from the name of the applicant into his own name. Respondent was also said to have approached ZIMRA and ZINARA for the same purpose.

Alarmed by these developments, applicant filed this application seeking an interim relief for the return of the property pending the return date. Applicant contended that the application is urgent and that applicant has a *prima facie* right as the motor vehicle is registered in its name. It was further contended that the respondent has no claim of right to possess the property in that the termination of his contract of employment effectively and lawfully disentitled him to the property. Applicant submitted also that it is likely to suffer irreparable harm if the provisional order is not granted. It further submitted that the balance of convenience favours the granting of the provisional order in that if the order is declined the respondent will multiply his efforts to cause the disappearance of the vehicle. On the other hand if the order is granted the applicant undertakes that pending the return date, the Deputy Sheriff keeps the motor vehicle keys while the motor vehicle is kept at the applicant's premises. The prejudice to the respondent will simply be the inconvenience of not using it temporarily.

The application was strenuously opposed by the respondent on the following grounds:

- (1) respondent contended that he was not applicant's employee but its director and shareholder.
- (2) that he purchased the motor vehicle in terms of his contract of employment and that, that agreement was authorized by the applicant's Board of Directors in one of the meetings.
- (3) that the laptop was purchased by the applicant and then given to him as his personal property.
- (4) that the he never removed a file from the accounts department.

Respondent conceded that an agreement of sale between him and applicant in respect of the motor vehicle does not exist. He also admitted that no motor vehicle loan agreement was signed between applicant and respondent. He insisted that the authorization was done verbally although at some stage he said minutes are available at one of his houses in Harare and if given a chance to produce them, they will prove that the laptop was a donation. Finally, respondent insisted that he was entitled to the motor vehicle and laptop as he was a director, shareholder

whose labour dispute with applicant has not yet been resolved. In addition to the general requirements for an interdict, the specific issues in this matter are as follows:

- (a) whether or not the applicant is the owner of the motor vehicle, laptop and a folder?
- (b) whether or not the respondent is in possession of property mentioned in (a) above without the applicant's consent?
- (c) whether or not the respondent has any right against the applicant that entitled him to continue to hold that property.

The law

Our law, broadly stated is that once an employee has been suspended or dismissed from employment, any benefits extended to that employee from that relationship cease. In *Chisipite School Trust (Pvt) Ltd v Clark* 1999 (2) ZLR 324 (S) GUBBAY CJ (as he then was) stated;

“Pending the removal of the suspension, the respondent was not entitled to the continued enjoyment of the benefits comprising the free occupation for the Headmistress' house and the continued use of the motor vehicle.”

As regards the *actio rei vindicatio* the position is that our law jealously protects the right of ownership and the correlative right of the owner in regard to his property, unless of course the possessor has some enforceable right against the owner – *Mashave v Standard Bank of South Africa Ltd* 1998 (1) ZLR 436 (S); *Oakland Nominees Ltd v Gelria Mining & Investment Co. Ltd* 1976 (1) SA 441 (A) at 452A.

An applicant who seeks to rely on the *actio rei vindicatio* must establish the following;

1. that he is the owner of the property *Jolly v Shannon & Anor* 1998 (1) ZLR 78 (H)
2. that at the commencement of the action, the thing sought to be vindicated was still in existence and the respondent was in possession of the property; *Masuli v Jera* HH-67-07.
3. That the respondent's possession is without its consent: *STANBIC Finance Zimbabwe v Chivhungwa* 1999 (1) ZLR 262 (H).

Put differently, 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 *rei*, the onus being on the defendant to allege and establish any right to continue to hold against the owner.

In casu, it is only the ownership of the property that is in issue. The 2nd and 3rd requirements being common cause have, therefore been met. As regards the 1st issue relating to ownership, it is common cause that applicant bought the property in question. The applicant has attached a registration book in its name in respect of the motor vehicle. It has also denied that it sold the motor vehicle to the respondent through a motor vehicle loan agreement or through any other method. As regards the laptop, the applicant has produced a receipt from the supplier showing the serial number for the laptop. It maintains that the laptop is its property.

Respondent on the other hand failed to produce proof of ownership of the property. His contention is improbable in my view. If what he submitted is true, one wonders why he failed to show the police who are looking for him on allegations of theft, the documents that prove his ownership of the motor vehicle. Instead of exonerating himself, respondent is playing hide and seek with the police refusing to show them the vehicle. These are certainly not the actions of an innocent purchaser and possessor. Quite clearly, there is something respondent knows to be untoward about his alleged ownership of the motor vehicle. Moreso, if respondent knows that he is in lawful possession of the vehicle, one wonders why he did not mention this fact in his application under HC 1067/17 and attaching proof of ownership.

I must point out that while it is a fact that respondent was entitled to a motor vehicle loan in terms of the contract of employment, there is no evidence that he indeed requested for a loan to purchase the vehicle. In any event if the applicant had wanted a motor vehicle loan in line with the motor vehicle policy, there will be no reason for the motor vehicle to be registered in applicant's name. Bearing in mind that the onus to prove the existence of a right of retention or a contractual right is on the respondent, I have no difficulty in finding that the respondent has failed to discharge this onus. Consequently, I find that the applicant is the owner of the motor vehicle and laptop.

As regards the file, respondent kept on alleging that applicant's directors are criminals who are externalizing funds and he has proof of such financial maladministration, which proof he said he handed over to the police for use against the applicant and its directors. I have no doubt that the source of that information is the file he removed from the accounts office. In the circumstances I find that the respondent is in unlawful possession of the file.

In my view, the applicant has established a *prima facie* right to the property. There is clear irreparable harm should the respondent succeed in his efforts to change the ownership regime of the motor vehicle. A claim for damages in the circumstances would not be an adequate alternative remedy in that respondent had no capacity to pay those damages being unemployed. The balance of convenience favours the granting of the provisional order in that the respondent would not suffer any prejudice if the order is granted unlike the applicant.

For the reasons set out above I consider that there is no merit in the respondent's claim of right.

Accordingly, I would make the following provisional order:

1. Pending the finalisation of this case, the respondent be and is hereby ordered to forthwith restore possession of a JMC double cab registration number AFF 2592, HP laptop serial number CND 44709N and a records folder to the applicant.
2. The Sheriff of Zimbabwe or any of his deputies wherever situate be and is hereby directed and authorized to recover from the respondent, applicant's motor vehicle namely JMC double cab registration number AFF 2593, an HP laptop serial number CBD 44709N and a records file and deliver same to the applicant.
3. The Sheriff of Zimbabwe or his lawful deputies shall hold the keys to the motor vehicle in 2 above pending the return date of this provisional order.

Masiye-Moyo & Associates (incorporating Hwalima, Moyo & Associates) applicant's legal practitioners