

ZIMPAPERS PENSION FUND
versus
FORTUNATE CHAGWEDERA
and
GLADYS KHUPE

HIGH COURT OF ZIMBABWE
TAKUVA J
HARARE, 6 June 2013

Opposed Application

J.C.M Muzangaza, for the plaintiff
S. Hwacha, for the defendants

TAKUVA J: This is an opposed application for a postponement. The application was granted in open court and reasons were given *ex tempore* in the presence of the parties and their legal practitioners. This was on 20 May 2013.

However, Counsel for the plaintiff wrote to the court on the same day requesting that “the ruling on the application be typed and made available to the parties as soon as possible”. I must point out that the court only received this letter on 4 June 2013. Be that as it may, the reasons for the ruling are as follows:-

- (1) Both defendants’ occupation of the flats is based on employer/employee relationship. This is common cause.
- (2) There is a labour dispute currently pending before the Supreme Court where in the defendants’ defence in this court traverses the same issue before the Supreme Court namely, the lawfulness of their occupation of the plaintiff’s flats.
- (3) The determination of the lawfulness or otherwise of the termination of defendants contracts of employment is critical in that in an action for *rei vindicatio* which is an action in *rem* the owner, in the present circumstances, must allege and establish that the contract of employment was in fact lawfully terminated – see for example *Chetty v Naidoo* 1974(3) SA 13(A) 21 where it was held that “a plaintiff who claims possession by virtue of his ownership must *ex facie* his statement of

claim prove the termination of any right which he concedes the defendant would have had but for the termination...”

- (4) In *casu* it is immaterial that the plaintiff is not the defendant’s employer. What is relevant and crucial is that the plaintiff has conceded in its pleadings that the defendants originally obtained possession of the *res* in terms of contracts of employment and that the plaintiff entered into lease agreements with the defendants on that understanding. It follows therefore that there is a nexus between the lawfulness of the defendants’ occupation (which is the first issue *in casu*) and the lawfulness of the termination of their contracts of employment (which issue is before the Supreme Court).
- (5) In my view the question of whether an employer can institute the *rei vindicatio* action before the lawfulness of the termination of a contract of employment has been determined is still shrouded in mystery – see comments by MAKARAU J (as she then was) in *Zimtrade v Malord Makaya* HH 52-2005. See also *DHL International (Pvt) Ltd v Clive Madzikanda* HH 57-2010.
- (6) It is common cause that the parties did not effect discovery in terms of Order 24 of the High Court Rules 1971.

For these reasons, the court ordered that:-

- (1) The matter be and is hereby postponed *sine die* pending the outcome of the defendants’ appeal before the Supreme Court.
- (2) Defendants be and are hereby ordered to pay the plaintiff’s wasted costs.

Muzangaza Mandaza & Tomana, plaintiff’s legal practitioners
Dube Manikai & Hwacha, defendant’s legal practitioners