

WILLIAM BAIN & COMPANY
HOLDINGS (PRIVATE) LIMITED
versus
AMON NYAMUKUNDA

HIGH COURT OF ZIMBABWE
MATHONSI J
HARARE, 18 September & 25 September 2013

Opposed Application

Ms G. Nyamayi, for the applicant
R. Mufuka, for the respondent

MATHONSI J: The applicant and the respondent enjoyed an employer-employee relationship for a period of 16 years, the respondent having been taken in initially as a low level employee but, to his credit, rising through the ranks to the position of branch manager for Marondera.

At some stage during the period of employment, the respondent was issued with the employer's Ford Ranger 1800 pick-up registration number AAO 4838 for use although initially he was not entitled to it. When he was promoted to branch manager, it was a condition of employment that he be allocated a vehicle and therefore held the vehicle as part of his conditions of service. In addition, he was also allocated a company house, being no. 1088 Fairview Crescent, Winston Park, Marondera at a nominal rental of US\$20-00 per month deducted from his salary.

On 16 May 2011, the respondent resigned from employment and in his letter of resignation of that date, he requested to purchase the motor vehicle that he was using. The applicant refused to sell the motor vehicle to him and demanded that he surrenders it and also vacate the company house on a given date. The respondent did not surrender the vehicle neither did he vacate the house.

I must mention that a dispute arose between the parties hinging on whether the respondent had resigned or had been dismissed as the applicant had, after the respondent's resignation, purported to conduct a disciplinary hearing and to dismiss him from employment. Although that leg of the dispute between the parties is not before me, I mention

for completeness that it has since been resolved by the Labour Court which concluded that the respondent had in fact resigned and had not been dismissed.

Be that as it may, the respondent's refusal to surrender both the vehicle and the house prompted the applicant to make this application before this court seeking an order compelling the respondent to surrender the property. The application is opposed and in his opposing affidavit which also betrays the level of acrimony in the relationship between the parties, the respondent sought to argue that as the motor vehicle and accommodation were part of his employment benefits, those issues were outside the jurisdiction of this court and fell for determination by the Labour Court which was then seized with an appeal he had lodged therein.

The respondent insisted that in terms of the conditions of service of the applicant, he was entitled to purchase the vehicle as he had had it for 7 years when the conditions of service allowed an employee the right to purchase a vehicle allocated to him at the expiration of a period of 5 years.

I intend to deal with the issues which fall for determination in turn. Regarding the issue of jurisdiction this court has stated on times without number that its jurisdiction has been ousted by the provisions of s 89(6) of the Labour Act [*Cap 28:01*] only in those matters where the Labour Court is granted specific jurisdiction by s 89(1) of the Act: *Medical Investments Ltd v Pedzisayi* 2010(1) ZLR 111 (H) 114C; *DHL International Ltd v Madzikanda* 2010(1) ZLR 201 (H) 204 B-D; *Moyo v Gwindingwi N.O. & Anor* HB 168/11 at p 5-6; *Jambwa v GMB* HH 124/13; *P G Industries (Zimbabwe) Ltd v Machawira* HH 255/12.

The Labour Court enjoys exclusivity in all matters where the cause of action and the remedy are all provided for in the Act. Outside that, for instance where the cause of action and the remedy are located in the common law, the ouster provision in the Labour Act has no application and this court will exercise jurisdiction.

In *casu*, it is common cause that the employment contract of the parties was terminated in May 2011. The applicant insisted that it had been terminated by dismissal while the respondent took the view that he had resigned. As I have already stated, the Labour Court decided in favour of the respondent concluding that he had resigned. Whatever the case, the employment of the respondent was terminated and he is no longer an employee of the applicant.

The situation presented by this case is the same as that which arose in *Medical Investments Ltd v Pedzisayi (supra)* and I can do no better than repeat what was stated by MAKARAU JP (as she then was) at 114 F-H 115 A that:-

“While it has to be accepted that the respondent’s claim of right to the motor vehicle arises from her terminated contract of employment with the applicant, this is a far cry from holding that there is a labour dispute between the parties that can find a remedy or resolution in terms of the Act. The resolution of the dispute between the parties is not entwined with the resolution of the contract of employment, as was the case in *Zimtrade v Makaya supra* (2005 (1) ZLR 427 (H)). There, pending determination of the contract of employment, the employer sought to repossess its assets from the employee using the *rei vindicatio*. It appeared to me then to be the correct position at law that where the validity of the suspension of the employee or the termination of their employment is still pending, the *rei vindicatio* could not properly lie at the instance of the employer. I am still of the same view. On the contrary where the status of the former employee is without dispute, the *rei vindicatio* can lie at the instance of the employer in appropriate cases and the matter thereby falls outside the purview of the Labour Court as it is not a matter that can be heard or determined in terms of the Labour Act or any other related enactment. It is my view that the *rei vindicatio* is not a cause of action whose remedy can be granted in terms of the Act as a stand-alone remedy in the absence of a dispute that is specifically provided for under the Act”.

I associate myself fully with that pronouncement. I will therefore exercise jurisdiction.

Regarding the merits of the matter, the respondent’s opposition is 2 fold namely that he is entitled to purchase the motor vehicle as he has had it for more than 5 years as provided for in his conditions of service. Secondly, he is entitled to remain in the employer’s house until such time that he has been paid his terminal benefits. Mr *Mufuka* for the respondent submitted that the respondent is willing to vacate the house but would want that to be tied to payment of his terminal benefits. While conceding that the respondent did not have a lien right over the house, he still insisted on some kind of entitlement.

What is clear from the papers is that the respondent did not purchase the vehicle. At no time did the parties conclude a sale agreement involving the motor vehicle. In fact the respondent only requested to purchase the vehicle in his letter of resignation which request was turned down. I have also been referred to the applicant’s Personnel Policy and Procedure Manual dealing with the vehicle policy s 11 of which gives the applicant the sole discretion to authorise disposal of vehicles to employees, taking into account a number of factors including the employee’s disciplinary record, good performance at work and the vehicle’s mileage.

It cannot be said with any degree of certainty that the respondent is entitled to purchase the vehicle. Even if he was, this cannot give rise to an entitlement to retain it

pending the conclusion of a sale agreement. To that extent, the words of MAKARAU JP (as she then was) in *Medical Investments Ltd v Pedzisayi (supra)* at 116A are apposite. She said:

“I am unaware of any law that entitles a prospective purchaser to have possession of the merx against the wishes of the seller prior to delivery of the merx in terms of the sale agreement. I was not referred to any such law during the hearing of the matter. My limited research has not yielded any”.

In my view, it is the height of turpitude for the respondent to hold on to both the vehicle and the house years after termination of the employment contract under circumstances where he has no rights whatsoever over the properties. Mr *Mufuka* could not advert to any legal authority entitling a former employee to confiscate a former employer's property in the manner the respondent has done. He could not come up with any authority disentitling a former employer from vindicating against a former employee in respect of its property. The fact that the respondent is owed terminal benefits is not a ground for refusal to surrender assets.

In the end we are left with the tired and limping argument that because the respondent has referred the issue of whether the employment contract was terminated by dismissal or by resignation to the Labour Court, then this court should not entertain this application even though the Labour Court dispute not only did not have anything to do with the issues before this court but also determined that dispute by judgment delivered in May 2013.

I am satisfied that the applicant has made a good case for the relief sought. Accordingly, I make the following order, that:-

1. The respondent, or any person possessing through him shall within 48 hours of service of this order, surrender to the applicant a motor vehicle, namely a Ford Ranger 1800 registration number AAO 4838, failing which the Sheriff for Zimbabwe or his lawful deputy is hereby authorised and directed to take possession of the vehicle and hand it over to the applicant.
2. The respondent and all those claiming occupation through him shall vacate premises known as No 1088 Fairview Crescent, Wiston Park, Marondera within two (2) days of service of this order failing which the Sheriff for Zimbabwe or his lawful deputy is hereby authorised and directed to evict them from the said premises and handover possession to the applicant.
3. The respondent shall bear the costs of suit.

Honey & Blanckenberg, applicant's legal practitioners
Mufuka & Associates, respondent's legal practitioners