

ZIMBABWE POSTS (PRIVATE) LIMITED
versus
CHRISTOPHER MAMVURA CHIZURA

HIGH COURT OF ZIMBABWE
CHIGUMBA J
HARARE, 25 November 2013, 19 February 2014

Opposed application

Mr. C. Kwaramba, for the applicant
Mr. B. Peresu, for the respondent

CHIGUMBA J: At the hearing of this application I dismissed the application with costs. I gave brief oral reasons for the dismissal. I have now been asked to provide detailed reasons in writing. These are they:

“The applicant applied for an order in the following terms: IT IS ORDERED THAT:

1. The respondent and all those claiming occupation through him vacate stand number 35 Hospital road, New Town, Kwekwe within seven (7) days of this order, failing which the Messenger of Court or his lawful deputy is authorized and directed to evict the Respondent and all those claiming occupation through him.
2. The respondent shall pay the costs of this application.”

The facts which gave rise to applicant’s cause of action are that, respondent was employed by the applicant. He was suspended without pay or benefits on 13 January 2004. Thereafter, he was charged in terms of applicant’s code of conduct. A date was set for the hearing. The Union representatives who should have been part of the Disciplinary committee failed and refused to attend the hearing. There was no quorum, and a hearing could not be properly constituted. The matter was referred to the Ministry of Public service, Labor and Social Welfare in terms of the Labour Act. The matter was subsequently referred to compulsory arbitration; The Arbitrator ordered the dismissal of the respondent on 9 March 2005. Respondent appealed against his dismissal to the Labor Court on 22 March 2005. The appeal was decided in respondent’s favor, and the Labour Court referred the matter back to arbitration. The matter is

currently waiting to be determined by an arbitrator. Applicant accepts that what this means is that the issue of the dismissal is still to be decided and that the respondent is still under suspension without pay and benefits.

However, applicant averred that it is a company policy that certain classes of employees are provided with accommodation during the tenure of their employment and that, entitlement to company accommodation is based on the existence of the contract of employment. Applicant's submission is that the respondent lost the right to enjoy any employment benefit when he was suspended "without pay or benefit".

Respondent opposed the application for his eviction from the applicant's house. He averred that the arbitration proceedings in which his contract of employment was terminated were subsequently set aside by the Labour court. He averred that his occupation of the house in question is based on the existence of a contract of employment. He denied that his right to occupy the house was suspended when he was suspended without pay or benefits. His suspension did not result in him losing his right to occupy the house because the suspension did not terminate the contract of employment. That issue is still pending determination by an arbitrator. He averred that essential benefits cannot be withheld during suspension from employment. Lastly, respondent submitted that it is only when his contract of employment, which conferred the right to live in the house on him, has been lawfully terminated that he can be evicted from the house in question. In other words, he averred that, on the date of termination of the contract of employment, when he ceases to be an employee of the applicant, he will no longer be entitled to any benefits which flowed from the contract.

Applicant submitted that the crux of the matter is whether an employee who is on suspension without pay or benefits can continue to enjoy such benefits. With respect, applicant is asking the wrong question that is why its conclusion is incorrect. The correct question for determination is whether an employee, whose contract of employment has not been set aside, can be evicted from a house occupied in terms of that contract, whilst he is on suspension from employment without pay or benefits? In essence, the relief that the applicant is seeking constitutes an application for *rei vindicatio*.

Applicant contended that the court ought to be guided by the following cases:

Chetty v Naidoo 1974 (3) SA 13 @ 14 where it is stated that:

“It is inherent in the nature of ownership that possession of the res should normally be with the owner, and it follows that no other person may withhold it from the owner unless he is vested with some right enforceable against the owner (e.g. a right of retention or contractual right).”

This case derived its *ratio decidendi* from the case of:

Graham v Ridley 1931 TPD476, where the principle was stated as follows:

“It may be difficult to define comprehensively but there can be little doubt that one of its incidence is the right of exclusive possession of the res without the necessary corollary that the owner may claim his property wherever found from whomsoever holding it. It is inherent in the nature of ownership that possession should normally be with the owner and it follows that no other person may withhold it from the owner unless he is vested with some right enforceable against the owner.”

In this case it is common cause that the applicant is the registered owner of the property in question. What the court needs to determine is whether the respondent can withhold possession of the res on the basis that its contractual rights, which have not yet been determined, were not suspended when he was suspended from employment without pay or benefits.

Applicant also referred the court to the case of *Sanudi Masudi v David Jera* HH 67/07 @ p2-3 where it was stated that:

“Based on the authorities, it appears to me settled at law that the *rei vindicatio*, being an action in *rem*, is only available to owners of the property in issue, which at the time of the commencement of the action, is in the possession of the defendant and the defendant fails to prove a right to retain the property as against the owner.”

Does the respondent have a right to retain possession of the property until such time as his contract of employment is expressly terminated? A claim of right is one of the exceptions to the rule that possession of a res ought to be with the owner of the res, in the normal course of things. In *Stanbic Finance Zimbabwe LTD v Chivhungwa* 1999 (1) ZLR 262 (HC) MALABA J (as he then was), applied the principle of the *rei vindicatio* in respect of a motor vehicle owned by the plaintiff and leased to a buyer under a suspensive agreement of sale. In that matter, he referred to his decision a year earlier in *Jolly v A Shannon & Anor* 1998 (1) ZLR 78 (HC) where he had this to say at page 88.

“The principle on which the *actio rei vindicatio* is based is that an owner cannot be deprived of his property against his will and that he is entitled to recover it from any

person who retains possession of it without his consent. The plaintiff in such a case must allege and prove that he is the owner of a clearly identifiable movable or immovable asset and that the defendant was in possession of it at the commencement of the action. Once ownership has been proved its continuation is presumed. The onus is on the defendant to prove a right of retention: *Chetty v Naidoo* 1974 (3) SA 13 (A) at 20A-C; *Makumborenga v Marini* S-130-95 p 2. It follows that the action is based on the factual situation that prevailed at the time of the commencement of the legal proceedings.”

At the time that this application was made, did the respondent make any averment which constitutes sufficient proof of a right to retention of the applicant’s company house? If the respondent was entitled to company accommodation in terms of the contract of employment, does that constitute a right to remain in the property until such time as the contract is terminated, or is the right of retention suspended together with the respondent’s pay and other benefits, on the date of suspension? Applicant sought to rely on the case of *Chisipite School Trust Pvt Ltd v Clarke* 1999 (2) ZLR 324 @ 328, where the court held that;

“...Pending the removal of the suspension, the respondent was not entitled to the continued enjoyment of the benefits comprising the free occupation of the headmistresses’ house and the use of the motor vehicle...whether the acts of misconduct relied upon are ultimately proved and so result in the termination of her contract of employment, was an issue awaiting decision by a labour relations officer; and until made the enjoyment of all benefits remained lost to the respondent”.

It is crystal clear that applicant is being facetious in this approach; because a further reading of the court’s finding will show that the court went on to say that:

“...I consider that the learned judge would have erred had he not accepted the legality, under the regulations, of the temporary suspension and its consequences, as this court is now obliged to do”. (my underlining for emphasis)

The findings in that case were based on an interpretation of the Labour regulations that were in existence at the time, in 1998/1999, which have since been overtaken by amendments to the Labour Act. It would appear that in 1999, the labour regulations provided that where an employee had been suspended from employment, pending determination of misconduct hearings, all benefits were lost until a labor relations officer decided whether to terminate the contract of employment. That is no longer the law. Section 12 (6) of the Labour Act [*Cap 28:01*] now provides that:

“(6) Whenever an employee has been provided with accommodation directly or indirectly by his employer, the employee shall not be required to vacate the accommodation before

the expiry of a period of one month after the period of notice specified in terms of subs (s) (4) or (5).

It has been submitted by counsel for the respondent, which submission has found favor with me, that even though s 12 (6) relates to termination of employment by way of notice, it applies with equal force to an employment contract that has not yet been terminated. In fact s 12(6) is silent on what ought to happen to accommodation provided directly or indirectly, where the contract of employment has been suspended not terminated. This in my view suggests that this is not a benefit that is subject to suspension for any reason. It is conferred by the contract of employment, and it is terminated when the contract of employment is terminated.

Munyaradzi Gwisai, in his book, “and employment Law in Zimbabwe” 2006 Zimbabwe centre Harare, states that:

“Not all types of benefits may be suspended. Only those types of “benefits” that do not result in the de facto termination of the employment relationship may be suspended...this means that the benefits that relate to the sustenance of life like accommodation and food cannot be suspended as would otherwise have been the case under common law dismissal..” @ p 187.

According to *Silberberg, The Law of Property, 1975, Butterworths; Durban* p 192-193:

“If the owner...concedes...that the latter originally obtained possession of the disputed res in terms of a contract (such as a load, lease or hire-purchase agreement) he must at least allege and establish that such contract has expired by effluxion of time or that he was entitled to cancel it, and has in fact terminated it”.

Applicant has conceded that the respondent obtained possession of the house in question in terms of his contract of employment. Applicant has conceded, further, that the contract of employment has not been terminated, or suspended. Respondent’s pay and other benefits were suspended. Accommodation is not one of those benefits that is capable of suspension because it is a benefit that goes to the root of the contract of employment. It is either there, or it falls away when the contract falls away. It constitutes a claim of right, by the respondent, capable of defeating the *actio rei vindicatio*. Once the fate of the contract of employment is determined, the parties are at liberty to re-assess their attendant rights. Once the contract of employment is terminated, respondent will no longer have a claim of right, and applicant will meet the full requirements of the *actio rei vindicatio*.

In my view, the applicant has not placed any evidence before the court, that the respondent's contract of employment has been terminated. It follows that respondent is still vested with a contractual right to accommodation which is enforceable against the applicant. The application for vindication cannot succeed in the face of respondent's contractual rights, which are still extant. The application is dismissed with costs for these reasons.

Honey & Blanckenburg, the applicant's legal practitioners
Mbidzo Muchadehama & Makoni, the respondent's legal practitioners