

PRIMIER SERVICE MEDICAL AID SOCIETY
versus
HENRY MANDISHONA

HIGH COURT OF ZIMBABWE
MUREMBA J
HARARE, 19 July 2016 & 7 October 2016

Opposed application

Ms F Mahere, for the applicant
T Nyamasoka, for the respondent

MUREMBA J: On 19 July 2016 I heard this matter and delivered an *ex tempore* judgment in favour of the applicant. I have now been asked for the full reasons thereof and these are they.

This was an application for *rei vindicatio* in respect of a motor vehicle, namely a Mercedes Benz E300 registration number ADI 4658 belonging to the applicant which the respondent was using at the time he was still employed by the applicant as the Managing Director. The applicant's version of events was as follows. This motor vehicle was not the respondent's condition of service motor vehicle, but was acquired and reserved for the applicant's board. The respondent was employed from 1 May 2015 to 24 September 2015 whereupon he was suspended from duty pending the hearing of disciplinary proceedings against him on 16 November 2015. Following the respondent's suspension the applicant demanded its motor vehicle back from the respondent by way of a letter dated 12 October 2015. The applicant averred that it required the motor vehicle because its board was embarking on a tour of duty throughout the country and wanted to use the motor vehicle. The respondent did not return the motor vehicle. On 16 and 17 November 2015 a disciplinary hearing was conducted which the respondent chose not to attend. He had not even filed his defence to the charges. The Disciplinary Authority proceeded with the hearing in the absence of the respondent and heard evidence from witnesses. Pursuant to the hearing, on 24 November 2015, the Disciplinary

Authority made a determination of the matter and found the respondent guilty on the majority of the charges he was facing. It ordered his dismissal from employment with effect from 24 September 2015 which was the date of his suspension. By way of a letter dated 24 November 2015, and delivered at his residence on 25 November 2015, the respondent was advised of the outcome of the disciplinary proceedings. In that same letter the respondent was asked to return the motor vehicle by 26 November 2105, but he did not take heed. This prompted the applicant to make the present application on 13 January 2016 for the return of its motor vehicle.

It was the applicant's averment that the respondent had no lawful basis to continue holding on to its motor vehicle. This motor vehicle was not even part of the respondent's conditions of service. Instead it was the applicant's pool vehicle which the respondent was allowed to use in order to advance the business interests of the applicant. That the respondent was then allowed personal use of the motor vehicle was simply incidental. The applicant averred that the respondent had expressed his intentions to challenge the regularity and cogency of his dismissal, but that did not entitle him to hold on to its motor vehicle without its consent. The applicant prayed for the return of its motor vehicle.

On 28 January 2016 the respondent opposed the application stating that it was premature for the applicant to be making such an application since the dispute between the parties was still on going. The respondent stated that he had since taken the matter to a Labour officer to challenge his dismissal and the matter was still pending. He averred that the applicant could not therefore exercise its rights over the said motor vehicle. He further stated that after he had signed the applicant's employment offer letter he further negotiated for a review of his basic salary and benefits with the applicant's Interim Manager one Dr. Mhlanga. He succeeded in his negotiations and was given a revised offer letter substituting the initial offer letter that was attached to the applicant's application. The respondent attached the new offer letter as annexure D. That offer letter entitled him to two company official motor vehicles, an executive sedan and a terrain vehicle. He averred that he was then given the Mercedes Benz in partial fulfilment of his contract of employment and in line with the applicant's motor vehicle policy. He disputed that the motor vehicle in issue is a pool vehicle for the board. He said that each executive board member is allocated their own personal vehicle in terms of their respective contracts which do not provide for common use of the vehicles. He said that he was using the said motor vehicle within his

prescribed use. He said that he ignored the applicant's request of 12 October 2015 for him to return the motor vehicle because the board did not require the motor vehicle for its tour of duty.

The respondent averred that since the dispute between the parties was still on going before a labour officer it was misleading for the applicant to allege that his employment had been terminated. He further averred that as long as the validity of his suspension and termination of employment contract was still under challenge the applicant's claim cannot stand. He said that as long as the challenge was alive his claim of right over the motor vehicle remained alive.

In the answering affidavit the applicant averred that the respondent ceased to be its employee on 24 November 2015 when his employment was terminated. It said that while it was within the respondent's rights to challenge the regularity and lawfulness of his dismissal, this however, did not translate to entitlement to hold on to its motor vehicle against its consent. The applicant averred that the motor vehicle in question is its motor vehicle, the relationship in terms of which the respondent possessed and used it was no more and the respondent was now in possession and using the motor vehicle without and against its consent. The applicant submitted that the respondent could not have a claim of right to retain the motor vehicle when his employment had been terminated. The applicant went on to dispute the variation of the respondent's contract of employment by Dr. Mhlanga just after a month after his appointment as applicant's Managing Director thereby entitling him to two official company vehicles instead of one vehicle which his initial contract of employment entitled him to. The applicant went on to say that even if it was correct that the respondent's contract of employment was indeed varied to two official company vehicles as he says, these vehicles remained company vehicles which the respondent was not entitled to retain beyond the date of termination of his employment. The applicant said that there is nothing in its policy document governing the issue of vehicles which policy document the respondent attached to his opposing affidavit as Annexure E which can be taken to mean that any employee has a claim of right over its motor vehicle(s) at any stage during or after employment.

In the heads of argument the respondent's counsel sought to bring in new evidence which was not covered by the respondent in his opposing affidavit. That was not proper so I disregarded that evidence and confined myself to the evidence as contained in the respondent's opposing affidavit.

THE LAW

The present application is based on *rei vindicatio*. In *Alspite Investments (Pvt) Ltd v Westerhoff* 2009 (2) ZLR 226(H) @ 236E MAKARAU JP (as she then was) said,

“The *rei vindicatio* is an action that is founded in property law. It is aimed at protecting ownership. It is based on the principle that an owner shall not be deprived of his property without his consent. So exclusive is the right of an owner to possess his or her property that at law, he or she is entitled to recover it from wherever found and from whomsoever is holding it without alleging anything further than that he or she is the owner and that the defendant is in possession of the property. Thus it is an action *in rem*, enforceable against the world at large.(My emphasis)

This is settled law in this jurisdiction which hardly requires authority. (See *Sibanda v The Church of Christ* 1994 (1) ZLR 74 (SC); *Musanhi v Mt Darwin Rushinga Cooperative Union* 1997 (1) ZLR 120 (SC); *Mashave v Standard Bank of South Africa Ltd* 1998 (1) ZLR 436 (S) *Jolly v A Shannon & Anor* 1998 (1) ZLR 78 (HC) and *Stanbic Finance Zimbabwe Ltd v Chivungwa* 1999 (1) ZLR 262 (HC).)”

At 237B she went on to say,

“There are primarily two defences to the *rei vindicatio*, each aimed at destroying each of the two essential elements of the action. The first one seeks to destroy the claim of ownership completely by denying that the plaintiff is the owner of the property in question or seeks to diminish his rights in the property by admitting his or her ownership but by alleging that the plaintiff has parted under some recognized law, with the right to exclusive possession of the property. The second defence of course is to deny possession of the property at the time the action is brought or the claim is instituted.”

In a case where the defendant does not dispute that the plaintiff is the owner of the property and that he (the defendant) is in possession of the plaintiff’s property, the defendant has the onus to allege and establish a right to continue to hold the property against the owner. In other words the defendant has to show that he has a claim of right over the property. See *Jolly v Shannon & Anor* 1998 (1) ZLR 78 (HC). In *Chetty v Naidoo* 1974 (3) SA 13 at 20 B-D it was held that,

“It is inherent in the nature of the 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 impossible right against the owner e.g. a right of retention or contractual right.”

The question that arises in this case is does a suspended or dismissed employee have a right to hold on to the employer’s property because he or she is challenging the suspension or dismissal?

Mr. Nyamasoka referred to the case of *DHL International (Pvt) Ltd v Clive Madzikanda* 2010 (1) ZLR 204 (H) at 205G wherein it was held,

“It appears to me that in *casu*, the right of the applicant to possess the motor vehicle is subject to the rights that the respondent has to the vehicle in terms of his employment with the applicant. Whilst the applicant has deposed to the fact that the respondent has been dismissed from employment, that dismissal is subject to appeal. It is still in dispute and so are the entitlements of the respondent under the contract of employment.”

At 206G it was further held,

“While the law regards the respondent as dismissed, he has never accepted that position and is challenging his purported dismissal before the Labour Court. For as long as his challenge is alive and not fully determined, his claim of right remains alive with it. It is only when his challenge is invalidated at law that he loses the basis for his claim of right. The claim that the respondent has is not in my view dependent upon whether the law regards him as an employee or not. Rather, it is dependent upon whether or not the dispute between the parties has been definitively resolved. In this instance, the dispute between the parties is pending before the Labour Court and resultantly, the claim of right remains alive.”

It is clear that in the above case this court decided that in a case where an employee is challenging his dismissal his claim of right over the employer’s vehicle or property remains alive and valid. In contrast in *Chisipite Schools Trust (Pvt) Ltd v Clark* 1992 (2) ZLR 324 (S) @ 328 GUBBAY CJ said,

“Pending the removal of suspension, the Respondent was not entitled, to the continued enjoyment of the benefits comprising the free occupation of the Headmistress ‘house and the continued use of the motor vehicle. A labour relations officer cannot order the Respondent to surrender these particular benefits. Consequently, the Applicant being unable to resort to self-help approached the High Court for relief. I consider it was justified in doing so.”

In *Nyahora v CFI Holdings (Pvt) Ltd* SC 81/14 the Supreme Court also reached a different decision from that of *Alspite Investments (Pvt) Ltd v Westerhoff supra*. The appellant who was employed by the respondent was suspended without pay and benefits pending disciplinary proceedings. He was asked to return the vehicle that was allocated to him for the performance of his duties and he refused to return it. The disciplinary proceedings were held and the appellant was found guilty of the misconduct charges. He was dismissed from employment and was asked to return the vehicle. Still he did not take heed. He went on to appeal against his dismissal in the Labour Court. The respondent successfully instituted *rei vindicatio* proceedings

in this court in respect of the vehicle. The appellant went on to appeal to the Supreme Court. In dismissing the appeal ZIYAMBI JA said that in an action of *rei vindicatio* the owner should merely allege that he is the owner of the property and that the property was in the possession of the defendant/respondent at the commencement of the action or application. She further said that if the owner alleges any lawful possession at some earlier date by the defendant, then he must allege that the contract has come to an end. The learned judge of appeal concluded by saying,

“The ownership of the vehicle, therefore, remained vested in the respondent. Upon his dismissal, which was not suspended by the appeal noted against it, the appellant ceased to be an employee of the respondent and any former right acquired, by virtue of his employment, to possession of the vehicle for his use also ceased.”

Apart from being guided by the Supreme Court as a higher court, I also happen to agree with its reasoning in the above cited case as opposed to the reasoning in the *DHL International (Pvt) Ltd* case. With all due respect my point of departure is where the learned Judge in *DHL International (Pvt) (Ltd)* says, “The claim that the respondent has is not in my view dependent upon whether the law regards him as an employee or not. Rather, it is dependent upon whether or not the dispute between the parties has been definitely resolved.” I am of the view that the respondent’s claim is dependent on whether or not the law regards him as an employee. This is because the respondent was allowed the use of the vehicle pursuant to his contract of employment with the applicant. Once that contract was terminated the basis of his claim fell away. The fact that he is disputing termination of that contract cannot entitle him to retain possession of the applicant’s property. To hold that would be tantamount to saying that the respondent is also entitled to his salary pending the determination of the challenge. I find this illogical.

In light of the above discussion I was in agreement with Ms. *Mahere*’s argument that the fact that the pending challenge to the lawfulness of the respondent’s dismissal did not entitle the respondent to withhold the applicant’s motor vehicle. The applicant’s motor vehicle policy that the respondent attached to his opposing affidavit as Annexure E states in clause 4 that all company cars allocated as part of Remuneration and Benefits Policy shall be registered under the applicant and shall remain the sole property of the applicant. It further states that ownership shall transfer to a beneficiary of company car where the car has been sold to the employee. Clause 12 states that in cases of termination of employment through dismissal, the employee shall lose all

rights to the company car and all attendant benefits thereof. There was neither an averment by the respondent that the car was registered in his name, nor that the car was sold to him. The applicant lost all rights to the vehicle that was allocated to him for use when he was dismissed from employment. The defence that the respondent raised for retaining the vehicle beyond the date of termination of his employment is without merit. It does not defeat the applicant's claim for the return of its vehicle. As a result, I granted the application.

I awarded costs on a higher scale against the respondent because the respondent did not have any justification for clinging on to the applicant's motor vehicle. When he was suspended from duty he was asked to return the vehicle and he refused. When he was called to attend the disciplinary hearing he did not file a defence nor did he attend. Subsequently, when he was dismissed from employment he was asked to return the vehicle and he refused once again. As a dismissed employee he should have simply handed over the applicant's motor vehicle. The fact that he was challenging the dismissal was another issue.

For the above reasons, I granted the applicant's claim as claimed in the draft order.

Atherstone & Cook, applicant's legal practitioners

Muzangaza mandaza & Tomana, respondent's legal practitioners