

AFM IN ZIMBABWE
versus
JOSIAH GARAMUKANWA

HIGH COURT OF ZIMBABWE
DUBE J
HARARE, 13 and 22 January 2015; 15 June 2015 and 27 June & July 26 2017.

Opposed Matter

O Shava, for the applicant
C Warara & T Bhatasara, in his capacity as *Curator ad Litem* for the respondent

DUBE J: This court has time and again held that where an employee stands suspended or dismissed, he ceases to have any right to possess or occupy company property that he had entitlement to use as part of his employment benefits during the tenure of his employment. This is so unless the employee can prove some legal entitlement to continue holding onto the property. This call has generally gone unheeded as this court continues to be swamped with *rei vindicatio* applications by former employers seeking to reclaim their properties. This is one such case.

The facts of this case involve a former pastor of the Apostolic Faith Mission of Zimbabwe Church who was deployed at Masiyirwa Assembly in Zvimba under the Harare West Province of the Church. The respondent was allocated a church house for his use as the church pastor. He was charged with misconduct which led to his dismissal. On 29 November 2013, the respondent was asked to vacate the church house. He has failed to comply with that request. The applicant seeks an order evicting him from the house.

At the time of the hearing of this matter, the respondent had lodged an appeal against his dismissal with the Labour Court. He contended during argument that he was entitled to remain in the house until finalization of the labour dispute. He submitted that the applicant has not

terminated his employment. He contended that it is the Harare West Province that dismissed him and not the AFM in Zimbabwe Church. He maintained that he remains a pastor with the applicant and that the house that he occupies does not belong to Harare West Province. He contended that he was not dismissed in terms of the church constitution and hence his challenge of the determination. The appeal at the Labour Court has since been dismissed.

Before I determine the merits of this application, I wish to make a few remarks on an occurrence that took place during proceedings. When the respondent's legal practitioner was making his concluding remarks, the respondent suddenly stood up and started approaching the bench and had to be restrained. He started screaming and shouting as he left the court room. The court adjourned and requested the parties to attend at its chambers. It emerged during discussions that the respondent had lately been acting irrational. When an attempt was made to serve him with notices of hearing of this application, the respondent had gathered stones and thrown them at persons trying to serve him with the notices. Upon being advised of this account, the court suggested that the respondent be medically examined to determine his state of mind and if necessary that a *curator ad litem* be appointed for him to investigate his circumstances. The defendant did not voluntarily submit to a medical examination. The matter was struck off the roll. The applicant subsequently made and was granted an application through the chamber book for appointment of a *curator ad litem* for the respondent. Mr Bhatasara was appointed the respondent's *curator ad litem*. The curator investigated his mental state. He interviewed members of his family and his former legal practitioners. He discovered in the course of his investigations, that the defendant had been arrested in connection with a death which occurred at Chinhoyi in 2015. He faced culpable homicide charges. The magistrate who dealt with his matter ordered that he be medically examined in terms of s 26 of the Mental Health Act and is reported to have a mental illness. At a subsequent hearing, the curator ratified the steps taken before his appointment and judgment was reserved. Mr Bhatasara did not initially file a report of his findings and did so at the request of the court.

The right to appoint a curator has its origins under common law, see *Ex parte Hill* 1970 (3) SA 411. The appointment of a *curator ad litem* is provided for in r 249 of our rules. A *curator ad litem* is a person who is appointed by the court to act in a lawsuit on behalf of another person. He may be appointed on behalf of a child or an incapacitated adult who the court deems

incapable of representing his interests in a suit. A mentally defective person is at law deemed incapable of representing himself. Every litigant is required to have the requisite mental capacity to understand and appreciate legal proceedings. Where a litigant is shown to lack capacity, he must be represented by a *curator ad litem* who litigates on his behalf. Before a court appoints a curator, it has to be satisfied that a litigant's condition is such that it warrants the appointment of a curator. The curator's powers are limited to the case he is required to investigate. The curator has no power over the person or assets or other affairs of the litigant except those which have a bearing on the investigations he is required to carry out.

On appointment, a curator must interview the litigant concerned and make enquiries concerning the litigant's mental state and other relevant circumstances and prepare a report. The curator's report is relevant to the proceedings. He must in every case file a report. He must also through his report appraise the court of the investigations he carried out, the litigant's mental state and comment on the ability of the litigant to represent himself. A curator is an officer of the court and remains so until discharged by the court. A curator's role is to assist the court in the determination of the matter concerned. He is expected to represent the incapacitated litigant and advance arguments in favour of the litigant's case. He is not expected to assume a neutral or objective position. See *Ex Parte Glendale Sugar Millers (Pty) Ltd* [1973] 1 All SA 332; 1973 (2) SA 653 (N) at 659 H, *Du Plessis N.O v Strauss* [1988] 4 All SA 115; 1988 (2) SA 105 (A) at 120 A-D).

In a case where a litigant reveals signs of mental instability during the course of proceedings, the court may appoint a curator to assist him in the proceedings. The curator must on appointment read the record of proceedings and apprise himself of its contents and prepare to proceed with the matter and represent the incapacitated litigant. Where a curator has not been appointed during the proceedings, an application may be made separately for his appointment. The court may have to stay proceedings to enable one to be appointed. The authors *Herbstein and van Winsen* in *The Civil Practice of the High Courts of South Africa*, 5 ed at p 169 state that where the curator is appointed after the action has already been instituted in the name of a mentally defective person, the curator may ratify the steps taken before his appointment. Mr. Bhatasara's conduct of ratifying the proceedings is proper in the circumstances of this case.

This claim is a *rei vindicatio* claim. The law is trite. The *rei vindicatio* is a common law remedy that entitles an owner of a thing to recover it from whosoever may possess it for as long as he shows that it is being possessed without his consent. This approach is based on the principle that an owner has exclusive possession or if his property and cannot be deprived of his property against his will and hence is entitled to recover it from whoever possesses or occupies it. See *Jolly v Shannon & Anor* 1991 (1) ZLR 78. In *Chetty v Naidoo* 1974 (3) SA 13, where the court remarked as follows regarding ownership;

“The owner may claim his property wherever found, from who-so ever is holding it. It is inherent in the nature of ownership that possession of the *rei* 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 a contractual right). 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 *res*, the onus being on the defendant to allege and establish any right to continue to hold against the owner” See also *Stanbic Finance Zimbabwe v Chivhunga* 1999 (1) ZLR 262 (HC). *Hwange Colliery Company v Tendai Savanhu*, HH 395/13.”

A litigant who brings a *res vindicatio* is required to satisfy the following requirements,

- 1) that he is the owner of the property
- 2) that the property is possessed by the possessor
- 3) he is being deprived of the property without his consent.

Once an owner has proved that he is the owner of the property held by a respondent, the onus shifts onto the possessor to show an entitlement to continue holding onto the property.

In *Zimbabwe Broadcasting Corp v Gomo* 2010 (1) ZLR 8 (H) at 9G-H and 10A, the court dealt with a matter involving an employee who refused to hand over company property after his dismissal and remarked as follows,

“Our law is to the effect that once an employee has been suspended or dismissed from employment, any benefits extended to such employee from that relationship cease. In *Chisipite Schools Trust (Pvt) Ltd v Clark* 1992 (2) ZLR 324 (S) GUBBAY CJ stated;-

“Pending the removal of suspension, the Respondent was not entitled, to the continued enjoyment of the benefits comprising the free occupation of the Headmistress’s 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.”

See also *Chisipite Schools Trust (Pvt) Ltd v Clarke, Surface Investments Pvt Ltd v Chinyani* HH 295-14, *Zimasco Private Limited v Farai Maynard Marikano* SC181-10.

The court in the *Gomo (supra)* held that the benefit of a vehicle afforded to the respondent in terms of his contract of employment ceased when his contract was terminated.

A former employee who previously had the benefit of use of a company car ,house or other property stemming from his contract of employment ceases to have any right to continue holding or occupying the property the moment he is either suspended or is dismissed from his employment. He may not insist on retaining occupation of the property because he has challenged his suspension or dismissal with the Labour Courts. The moment the employment contract is terminated all rights that flow from the contract cease, leaving the employee with no right to hold onto the property of the employee.

The respondent did not refute that the house which is at the centre of this dispute belongs to the applicant. He has not disputed that he was in occupation of the house at the commencement of these proceedings and continues to occupy the house without the consent of the owner. The applicant has proved all the requisites of a *rei vindicatio*. The onus shifts onto the respondent to prove his right of retention. The respondent tried to split hairs by arguing that he was dismissed by the AFM Harare West Province and not the applicant and that he remains an employee of the applicant. His argument has since been overtaken by events as his appeal to the Labour Court was dismissed. The respondent stands dismissed by the applicant. The respondent's right to occupy the church house is based on the existence of a contract of employment the parties entered into. In the face of his dismissal, he ceases to have such a contract of employment with the applicant. His right to possess and occupy the house extinguished on termination of the contract. There is no longer any benefit to speak about. The right to enjoy and occupy the house ceased upon the termination of his employment. Benefits associated with the contract of employment ceased with the termination of the contract. He has no entitlement to continue occupying the house. The applicant is entitled to the order sought.

In the result it is ordered as follows,

1. The respondent and all those claiming ownership through him vacate applicant's church house at Masiyirwa Assembly, Zvimba, within 14 days of this order, failing which the Sheriff of the High Court is authorized and directed to evict the respondent and all those claiming occupation through him, with the assistance of the Officer in Charge, Zvimba Police Station, if necessary.

2. The respondent shall pay the costs of this application.

Mbidzo, Muchadehama & Makoni, applicant's legal practitioner
Warara & Associates, respondent's legal practitioners
Mr. Bhatasara, his *Curator ad Litem*.