

CHITUNGWIZA MUNICIPALITY
versus
MAXWELL KARENYI

HIGH COURT OF ZIMBABWE
TAGU J
HARARE, 15 & 28 February 2018

Urgent Chamber Application for *rei vindicatio*

N Mugandiwa, for applicant
G Majirija, for respondent

TAGU J: The applicant seeks an order of *rei vindicatio*. It seeks recovery of its property namely- motor vehicle, a Toyota Hilux Double Cab Registration Number AAE 7098, HP 450 laptop, Samsung Galaxy S5 and a Samsung tablet 4 presently in the possession of the respondent without the applicant's consent.

The circumstances are that the respondent was employed by the applicant as a Director of Works in terms of a written contract. The respondent gave notice of his intention to resign from the applicant's employment. He indeed resigned on the 18th December 2017. During the term of his employment the respondent was issued with a motor vehicle and other gadgets for use in the performance of his duties. Upon resignation the respondent remained in possession of the vehicle and the gadgets. Despite the termination of his employment the vehicle and the gadgets remained registered in the names of the applicant. The applicant requested the respondent to surrender the motor vehicle and other gadgets that were issued to the respondent during the course of his employment. The respondent despite lawful demand declined to return the property in question prompting the applicant to file a police report at ZRP St Marys CR 68/01/18, CID Chitungwiza DR17/1/18. The docket was referred to the Prosecutor General who declined to prosecute holding that the dispute was civil. This prompted the applicant to file this urgent chamber application for *rei vindicatio*.

The respondent opposed the application. He raised three points *in limine* in his Notice of Opposition which he thought could dispose of this matter which can be summarized as follows-

- a) The application is frivolous and vexatious;
- b) The application is not urgent;
- c) *Lis alibi pendens* and
- d) That the High Court has no jurisdiction to hear this matter.

I have to examine the points *in limine* first to decide whether they dispose of the matter without dealing with the merits of the application.

THE APPLICATION IS FRIVOLOUS AND VEXATIOUS

The respondent's contention was that he is entitled to the vehicle and the other gadgets in terms of clause 17 of his employment contract which provides that on resignation he was entitled to an option to purchase his allocated vehicle at 10% of book value. He averred that since he resigned his contract provides that as his benefits he is entitled to a 90% discount on his conditions of service hence in the event of not getting the vehicle he would be prejudiced of his 90% discount on the vehicle.

The applicant opposed this point *in limine* and relied on the cases of *Joram Nyahora v CFI Holdings Private Limited SC 81/2014* and *Tendai Savanhu v Hwange Colliery Company SC -8-2015*.

Clause 17 of the respondent's contract of employment provides that-

“Purchase Option at 10 % of Book Value

The HOD shall be given the first right of refusal to purchase his/her allocated vehicle as follows:

- (i) On expiration of contract.
- (ii) Upon resignation or resignation on medical grounds.
- (iii) Upon dismissal no purchase option will be exercised.”

The applicant's argument was that the property in question remained the property of the applicant and was never given to the respondent hence the applicant has a right to bring this application for *rei vindicatio*. It said though the contract of employment talks of respondent's right of first refusal to purchase the vehicle in question, the applicant was not obligated to sell the

property in question to the respondent. See *Eastview Gardens Residents Associations v Zimbabwe Reinsurance Corporation Ltd and Others* SC-90-02.

In this case it is not in dispute that the respondent resigned from his employment. It is common cause that by the time of his resignation the applicant had neither made a decision to dispose of the vehicle and the gadgets nor offered the said property to the respondent for sale. In my view the ownership of the vehicle and the other gadgets remained vested in the applicant. I therefore agree with the applicant's argument that by ceasing to be an employee of the applicant the respondent's possession and use of the gadgets also ceased unless they had been offered to the respondent to purchase. I entirely agree with the decisions of the Supreme Court in the cases of *Tendai Savanhu v Hwange Colliery Company* and *Joram Nyahora v CFI Holdings Private Limited supra*. On this basis the first preliminary point lacks merit and is hereby dismissed since the application is not frivolous and vexatious.

THE APPLICATION IS NOT URGENT

The respondent's argument was that this matter is not urgent because he advised the applicant on or about the 15th of December 2017 that he was not willing to release the said assets but the applicant took about 15 days without bringing this application. He attacked the certificate of urgency in that it did not disclose what the applicant was doing all along, that is it failed to disclose the reasons for the delay. For this contention the respondent referred the court to the case of *Kuvarega v Registrar General and Another* 1998 (1) ZLR 188 (H) at 193 where CHATIKOBO J Said-

“What constitutes urgency is not only the imminent arrival of the day of reckoning; a matter is urgent, if at the time the need to act arises, the matter cannot wait. Urgency which stems from a deliberate or careless abstention from action until the dead-line draws near is not the type of urgency contemplated by the rules. It necessarily follows that the certificate of urgency or the supporting affidavit must always contain an explanation of the non-timeous action if there has been any delay.”

See also *Document Support Centre v Mapuvire* HH-117-06.

In casu the applicant disputed the assertions made by the respondent. It argued that it first of all advised the respondent to return the assets. When the respondent refused to release the assets it lodged a report with the police. It was only three days after the Prosecutor General declined to prosecute the matter that it lodged this application. Indeed I had sight of both the certificate of

urgency and the founding affidavit. It is not true that the urgency in this matter was self –created because the papers clearly showed that the applicant firstly requested the respondent to return the assets. When he refused a police report was made. The matter was referred to court, and the Prosecutor –General then declined to prosecute. Only then did the applicant lodged this application. In my view, this matter is urgent and the second point *in limine* is dismissed.

LIS ALIBI PENDENS

The respondent submitted that he instituted a claim with the Ministry of Labour and Social Welfare in terms of s 93 of the Labour Act. The subject matter before the Labour Officer is a determination of his benefits including the car. This is the same claim which the applicant has brought to this Honourable Court. Hence he wants this claim to be dismissed.

In my view the matter before the Labour Officer is about the respondent’s benefits and arrear salaries. The matter before this court is one of *rei vindicatio*. These are two different matters. The claim cannot be dismissed on the basis of *lis alibi pendens* because the claims are different. This point is again dismissed.

JURISDICTION OF THE HIGH COURT

The long and short of the respondent’s submission was that the present matter relates to benefits which he is entitled to on the termination of his contract of employment hence the Labour Court has exclusive jurisdiction over this matter. In light of the above this court does not have jurisdiction to deal with the present matter hence the matter ought to be dismissed with costs. The respondent said the High Court declined jurisdiction in the case of *Telone (Private) Limited v Edwin Matinyarare* HH-140-13.

In opposition to the submissions the applicant referred the court to the case of *Joram Nyahora v CFI Holdings Private Limited supra* at pages 5-7 where the Supreme Court had occasion to deal with a similar issue. On p 7 of the cyclostyled judgment the Supreme Court in the above matter said-

“As submitted on behalf of the respondent, the right of an individual to approach the High Court seeking relief other than that specifically set out in s 89 (1) (a) of the Act, has not been abrogated. Nothing in s 89(6) takes away the right of an employer or employee to seek civil relief based on the application of pure principles of civil law, except in respect of those applications and appeals that are specifically provided for in the Labour Act. Nor

is there contained in s 89 any provision expressly authorizing the Labour Court to deal with an application, such as in the instant case, for the common law remedy of *rei vindicatio*. Such applications fall squarely within the jurisdiction of the High Court.”

I cannot do any better other than to hold that this court has jurisdiction to hear this matter. While the High Court declined jurisdiction in the case of *Telone (Private) Limited v Edwin Matinyarare supra*, in my view this judgment is persuasive but not as binding on me as the Supreme Court one. See also *Surface Investments Private Limited v Maurice Chinyani* HH-295-14; *Zimbabwe Broadcasting Holdings v Gono* ZLR 2010 (1) ZLR 8, *Zimbabwe Educational Scientific Social And Cultural Workers Union v Claud Kaharo* HH-222-2011 and *Gloria Rumbidzai Mkombachoto v Commercial Bank of Zimbabwe Limited and The Registrar of Deeds* HH-10-2002.

AD MERITS

The application before me is a *rei vindicatio* action brought by the applicant against the respondent. I will therefore deal with the matter without regard to what is happening at the Labour Court. In dealing with the matter I am mindful of the fact that an applicant seeking to rely on the *rei vindicatio* must prove the following-

1. That he is the owner of the property- *Jolly Shannon and Anor* 1998 (1) ZLR 78;
2. That at the commencement of the action, the thing to be vindicated was still in existence and the respondent was in possession of the property- *Masuli v Jera* HH-67-07, and
3. That the respondent's possession is without his consent-*Stanbic Finance Zimbabwe v Chivhunga* 1999 (1) ZLR 262.

It is trite law that the owner may claim his property wherever, from whoever 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. Such as right of retention or contractual right. The owner need only to prove that he is the owner and that the respondent is in possession without his or her consent. See *Silvertondale (Pvt) Ltd* 1999 (2) SA 986.

In casu the respondent contented that he was supposed to purchase the vehicle and the other gadgets. Yet it is common cause that the property belongs to the applicant. In my view the respondent failed to prove any right or entitlement to the property in question. He therefore must return it since he has no basis to continue holding onto the vehicle and the other gadgets. In the result the applicant has managed to prove its case. This is the point that was well articulated by the Supreme Court in the cases of *Joram Nyahora v CFI Holdings Private Limited and Tendai Savanhu v Hwange Colliery Company supra*. I will therefore grant the following order-

TERMS OF ORDER MADE

FINAL ORDER SOUGHT

That you show cause to this Honourable Court why a final order should not be made in the following terms:

1. The Respondent be and is hereby ordered to surrender possession of and to return to the Applicant:
 - (a) A motor vehicle namely a Toyota Hilux Double Cab, Registration Number AAE 7098,
 - (b) HP 450 laptop,
 - (c) Samsung Galaxy S5,
 - (d) Samsung Tablet 4

upon service of this order, failing which the Sheriff of Zimbabwe or his lawful deputy be and is hereby authorized to take all necessary steps to recover the said motor vehicle from the Respondent or any person whomsoever is in possession thereof and wherever the motor vehicle may be situate and return the same to the Applicant.

2. The Respondent should pay the costs of suit on an attorney client scale.

INTERIM RELIEF

Pending confirmation or discharge of this provisional order, Applicant is granted the following relief:

1. The Respondent be and is hereby ordered to surrender and return
 - i. A motor vehicle namely a Toyota Hilux Double Cab, Registration Number AAE 7098

- ii. HP 450 laptop
- iii. Samsung Galaxy S5
- iv. Samsung Tablet 4

to the Applicant's premises being Chitungwiza Municipality Head Office where it shall be kept/stored by the Applicant pending the return day.

2. In the event of the Respondent failing to comply with the terms of paragraph 1 of this order, the Sheriff or his lawful deputy be and is hereby directed and authorized to take any and all necessary steps to recover the said motor vehicle, HP 450 laptop, Samsung Galaxy S5 and Samsung Tablet from the Respondent or any person whoever is in possession thereof and return them to the Applicant for the purposes of compliance with paragraph 1 of this order.

SERVICE OF THE ORDER

A copy of this order be served upon the respondent by the applicant's legal practitioners.

Kantor & Immerman, applicant's legal practitioners
B Matanga IP Attorneys, respondent's legal practitioners