

CHIDO MUROMBEDZI
versus
SMM HOLDINGS [PVT] LTD

HIGH COURT OF ZIMBABWE
MAWADZE J & MAFUSIRE J
MASVINGO, 30 May 2018 & 13 June 2018

Civil appeal

Mr *C. Ndlovu*, for the appellant
Adv. *L. Mazonde*, for the respondent

MAFUSIRE J:

- [1] This was an appeal against an order of eviction granted by the court *a quo* in favour of the respondent against the appellant. The order of eviction was in relation to certain premises, a dwelling house, situate Shabani Mine, Zvishavane, owned by the respondent but which had at all relevant times been allocated to, and was occupied by, the appellant by virtue of his employment with the respondent.
- [2] In the court *a quo*, the grounds of claim, as pleaded by the respondent by way of a court application, were these:
- that the appellant was once employed by the respondent as Underground Manager;
 - that by virtue of his contract of employment he was entitled to a company house;
 - that in accordance with the contract of employment he had been allocated the premises in question;
 - that his entitlement to, and occupation of, those premises, or any others that he might have been allocated during the currency of his employment, would cease upon the termination of his employment with the respondent;
 - that the appellant had left the respondent's employment on 31 January 2012 [i.e. more than 4 years ago];

- that on various occasions the respondent had requested the appellant to surrender the premises back to it but that he had not done so;
- that despite a formal letter of demand by the respondent to the appellant to vacate the premises, he had remained in occupation.

[3] The appellant opposed the application. First, he took a point *in limine* that this was a labour dispute over which, by virtue of s 89[6] of the Labour Act, *Cap 28:01*, the court *a quo* had no jurisdiction. He then pleaded to the merits and denied that he had left the respondent's employ or that his contract of employment as Underground Manager with the respondent had been terminated, but that he had merely been seconded from Shabani Mine to the Zimbabwe Development Corporation ["*ZMDC*"] which in turn had seconded him to Kusena Zim Diamonds.

[4] In brief, the appellant's main grounds of defence in the court *a quo* were:

- that at all relevant times the respondent was a company under a reconstruction order in terms of the Reconstruction of State-Indebtedness Insolvent Companies Act, *Cap 24:27*;
- that when it was placed under a reconstruction order the ZMDC "*took over*" the respondent;
- that on 8 November 2011 the appellant was seconded to Kusena Zim Diamonds;
- that secondment simply means a period when an employee is sent by his employer to work for a different organisation or a different part of the same organisation;
- that at Kusena Zim Diamonds the appellant had been staying in a one-roomed cottage at the Mine Compound;
- that on 22 April 2015 the appellant had further been transferred to Jena Mines, a subsidiary of the ZMDC;
- that at Jena Mines the appellant was staying in a guest lodge;
- that as such, the appellant was still employed by the respondent and that until such time that his contract of employment with the respondent was terminated, his entitlement to occupy the premises in question remained.

- [5] The respondent produced several documents to back up his claims. One such was “Annexure M”, the letter dated 8 November 2011 written to him by the ZMDC. It advised him of his secondment to Kusena Zim Diamonds upon the terms and conditions spelt out therein.
- [6] On the duration of the secondment, Annexure M said this would depend on the exigencies of the work at both Kusena Zim Diamonds and some other mines named therein. On accommodation, the letter said the company would provide him with accommodation at the mine, subject to availability. On termination of employment, the letter said subject to the right of dismissal, notice of termination of employment would be three calendar months by either party. It stressed that the termination of that contract as a disciplinary measure would in no way give him the option to return to the respondent.
- [7] The other document produced by the appellant, “Annexure O”, was the letter to him by the ZMDC on 22 April 2015, advising of his further transfer to Jena Mines until further notice.
- [8] On the conditions of service, Annexure O said those obtaining at Jena Mines would apply, and that they included salary and benefits. However, the letter further said that this did not change the appellant’s original secondment status from Shabani Mine.
- [9] In an answering affidavit, the respondent, among other things, pointed out that Annexure M was ZMDC’s letter to him, not a letter from the respondent; that the letter was the appellant’s contract of employment with the ZMDC; that this showed that his contract of employment with the respondent had since been terminated as one could not report to two masters.
- [10] In granting the order of eviction, the court *a quo* found, or reasoned, as follows:
- that the issue before it was not of termination of employment but of eviction, and that as such, the court was empowered to entertain the application;

- that the appellant [then respondent in the court *a quo*] was on secondment to the ZMDC;
- that it had been clearly stated that the mine would provide accommodation and allocate the appellant with new residences at the new stations;
- that therefore there was no valid reason why the appellant should have two houses from different mines at the same time, in the same way that he did not receive two salaries at the same time.
- that upon transfer one could not hold onto the property of the previous station.

[11] Before us, the parties have largely repeated the same arguments as in the court below. Mr *Ndlovu*, for the appellant, has insisted that the ZMDC had “taken over” the operations of the respondent after it was placed under reconstruction and that none of the employees, the appellant included, had any say over their fate, except that the take-over should not prejudice them. He said the premises in question remained the appellant’s main accommodation which was tied to his contract of employment and that all the other residences that he might have been allocated at his new stations on secondment remained temporary accommodation.

[12] Mr *Mazonde*, for the respondent, denied that the ZMDC had taken over the respondent. He denied that there could have been any such thing as “taking over” of a company, by another company. He said the respondent was a company under a reconstruction order and which was under the control and direction of an administrator. Mr *Mazonde* insisted that the ZMDC was the appellant’s new employers and that it was the ZMDC, not the respondent, which was seconding the appellant every time it saw fit.

[13] There were some grey areas on some aspects of the matter which none of the parties could properly shed light. For example, what did it mean that the ZMDC had “taken over” the operations of the respondent? What were the terms and conditions of that take over, particularly with regards to the respondent’s labour force and its assets such as housing?

- [14] But undoubtedly, there had been some kind of transfer or relationship between the respondent, under reconstruction, and the ZMDC. In the case of *Badza v SMM Holdings [Pvt] Ltd [Under Reconstruction] t/a SMM Properties* HMA 20-17, it was common cause that the ZMDC, a parastatal, had become the respondent's sole or major shareholder after it had poured a substantial sum of money to resuscitate the respondent's operations. Surely, for such sums of money to pass hands like that some sort of agreement would have been signed to govern the parties' new relations. These agreements might, or might not shed light on, among things, the fate of the respondent's employees. None of the parties made reference to any such documents, let alone produce them.
- [15] The other grey area was in some of the expressions used in certain documents. For example, Annexure O, namely ZMDC's second letter to the appellant on 22 April 2015 further transferring him from Kusena Zim Diamonds to Jena Mines said, among other things, that the conditions of service obtaining at Jena Mines and which would now govern the appellant regarding his salary and benefits, would not change the appellant's original status from Shabani Mine. This would seem to support the appellant's argument that, contrary to the respondent's claim, his original contract of employment with it had never been terminated and that he was merely on secondment to the ZMDC.
- [16] It is true an employee who is on secondment to another branch of the employer or enterprise is transferred on a temporary basis. He remains employed by the seconding office or employer: see *Shumba v Commercial Bank of Zimbabwe* HH 100-06 and *Dairibord Zimbabwe Limited v Muyambi*¹. In *Dairibord's* case, Dairibord, the employer, had seconded Muyambi, the employee, from its main operations in Zimbabwe to one of its subsidiaries in Malawi, on a contract of secondment. Disgruntled by alleged non-performance, in Malawi, Dairibord terminated the contract of secondment. The Supreme Court held that the termination of Muyambi's contract of secondment had not terminated his original contract of employment in Zimbabwe.

¹ 2002 [1] ZLR 448 [S]

[17] Further ambiguity in the present case is brought by Annexure M's clause on termination of employment. It said:

“Subject to the right of dismissal, notice of termination of employment shall be three calendar months notice from either party in writing. Please be advised that termination of this contract as a disciplinary measure will in no way give you the option to return to SMM.”

[18] That clause would seem to imply that only the termination of the secondment contract on disciplinary grounds would disentitle him to return to the respondent on his original contract, suggesting that any other reason for termination would not present that difficulty for him.

[19] However, having looked at this matter holistically, we have found no misdirection by the court *a quo* in refusing to be entangled in issues of employment contracts, and in confining itself to the narrow issue of eviction.

[20] There is no doubt that the premises in question belong to the respondent. We did not hear Mr *Ndlovu* arguing that the form of the alleged “take over” of the respondent by the ZMDC entailed assuming ownership of the respondent's houses by the ZMDC. In the *Badza* case above, it was pointed out that one of the incidents of ownership of a thing is the owner's entitlement to its exclusive possession. The law presumes possession of the thing as being an inherent nature of ownership. Flowing from this, no other person may withhold possession from the owner unless they are vested with some right that is enforceable against the owner: see **Silberberg and Schoeman's** *The Law of Property*, 5th ed., at p 243. Otherwise an owner deprived of possession against his will, can vindicate his property wherever found, and from whomsoever holding it: see *Chetty v Naidoo*².

[21] In the present case, the appellant's original right to the occupation of the respondent's premises in question stemmed from his original contract of employment with it. It was not in dispute that such original right would be extinguished by the termination of that

² 1974 [3] SA 13 [A], at p 20B.

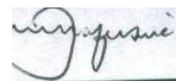
original contract of employment. The respondent said the contract had terminated. The appellant said it had not. However, the documents produced by the appellant himself suggest that it had. Annexure M was the contract of secondment by the ZMDC with the appellant in respect of the ZMDC's other operations. It was not the original contract of employment with the respondent. So was Annexure O. By the time of those documents the respondent had long since gone out of the picture.

[22] The appellant's argument is self-defeating. If ZMDC's taking over of the respondent entailed its taking over the of respondent's houses, then if he was being seconded and being given new accommodation at his new work stations, he would not be entitled to retain the original premises. As the court *a quo* noted, he would not be entitled to two houses from the same employer at the same time, in the same way that he would not be entitled to two or more salaries and benefits from the same employer at the same time. If it was *the quality* of the accommodation at the new work stations that the appellant was complaining about, then this would be a different case altogether.

[23] But we consider the correct position to be that the appellant's original contract of employment with the respondent, which had carried with it an entitlement to accommodation in the premises in question, had long since terminated, and that, as the generality of the documentation showed, he was now on a new and separate contract of employment with the ZMDC.

[24] In the premises, we find the appeal to be unmeritorious. It is hereby dismissed with costs.

13 June 2018



Hon Mawadze J concurred: _____ *Signed on Original* _____

Ndlovu & Hwacha, legal practitioners for the appellants
Chuma, Gurajena & Partners, legal practitioners for the respondent