

RUSAPE TOWN COUNCIL  
versus  
SOLOMON GABAZA

HIGH COURT OF ZIMBABWE  
MWAYERA J  
MUTARE, 12 and 26 November 2020

### **Opposed Application**

*N Mugiya*, for the applicant  
*T. C Sengwe*, for the respondent

MWAYERA J: This is an application for *rei vindicatio* in respect of a motor vehicle namely Foton Registration AAE 6811, Airtel WIFI Modem serial number 5LL 7517C22027996 and a Tel-One internet modem presently in possession of the respondent. The applicant claims it is the owner of the property which was issued to the respondent for conducting council business prior to his suspension and dismissal. The applicant contends that it requires the property so as to redeploy some to lawful council business. The respondent having been relieved of his duties is no longer entitled to possess the property in question.

The respondent on the other hand opposed the application on the basis that there is ongoing dispute and contestation relating to the regularity or otherwise of his suspension, disciplinary hearing and verdict of dismissal by the disciplinary authority.

The issue that falls for determination in this matter is whether or not the respondent has a right of retention of the applicant's property.

The background facts of this matter are common cause and can safely be summarised as follows:

The respondent was employed by the applicant as a Town Secretary. On 11 September 2020 after having been found guilty by a disciplinary authority which held him liable for contravening s 4 (a) of the National Employment Code of Conduct SI 15 of 2006 he was relieved of his duties. The dismissal followed an earlier suspension of the respondent by the applicant. On 14 September 2020 the applicant requested the respondent to return the Foton motor vehicle and wifi modems but the respondent refused and did not surrender the claimed

motor vehicle and gadgets. Mr *Mugiya* for the applicant argued that the applicant was seeking its assets to be restored for advancement of its business on the basis of *rei vindicatio*. He contended that the respondent having been dismissed had no basis for holding on to the applicant's property. He further argued that the property was issued to the respondent for furtherance of his duties. Now that respondent has been relieved of his duties since the employer-employee relationship has been terminated by firstly suspension and subsequently dismissal. The basis of possession fell off simultaneously with the severance of employment relationship. In the case of *Zimbabwe Broad Casting 2010 (1) ZLR 8* the court held that once an employee has been suspended (my emphasis) or dismissed from employment any benefits extended to that employee from that relationship cease. In the *Zimbabwe Broadcasting case GOWORA J* (as she then was quoted with approval the case of *Chisipite Schools Trust (Pvt) Ltd v Clark 1992 (2) ZLR 324* in which GUBBAY CJ (as he then was) stated as follows:

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

In the present case the respondent has been dismissed and remains holding onto the applicant's property despite demand. The basis of holding on to the property is that he is vested with some rights enforceable against the owner because he is challenging his dismissal which has not been confirmed by the Local Government Board. Mr *Sengwe* for the respondent argued that the respondent has a contractual interests in the asset motor vehicle as it forms part of his conditions of employment, therefore he shall only release the asset when his dismissal is otherwise confirmed in terms of s 139 (2) of the Urban Council Act [*Chapter 29:15*]. The respondent thus argued that as long as the labour dispute has not been conclusively resolved the respondent has right to retain the asset. The respondent sought to have the applicant's application dismissed as he has a claim of right to possess the property considering that he has not been lawfully and effectively disentitled. He cited the case of *Zimtrade v Malora Makanya HH 52-03* and *ZIMASCO (Pvt) Ltd v Farai Marikano HH 148/10*. Both cases rehash the fact that the employer's obligation to meet total costs for retaining and employee only vanishes when employment is finally terminated. The question really is, considering the common cause circumstances of this matter is the respondent still employed and entitled to hold on to the assets which belong to the applicant?

It is clear that what falls for consideration here is not the question of legality or propriety at the dismissal of the respondent. The respondent was suspended and subsequently dismissed. He has not challenged the decision of the disciplinary authority such that the determination remains extant. The contract of employment has been terminated from the date of suspension which was followed up by dismissal. What is crucial is not that the respondent does not accept or agree with the termination. I align myself to sentiments expressed by MUREMBA J in *Premier Services Medical Aid Society v Henry Mandishona* in HH595/16 commenting in a similar case of *rei vindicatio*. When she emphasised that the entitlement of an employee to the employer's property is dependent on the existing contract of employment. Once that relationship is terminated then an employer owner of property claiming property simple has to meet the requirements of *rei vindicatio*. She stated as follows on p 10 of the cyclostyled judgment:

“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 the contract was terminated the basis of his claim fell away. The fact that he is disputing termination of the contract cannot entitle him to retain possession of the applicant's property. To hold that would be tantamount to saying that respondent is also entitled to his salary pending the determination of the challenge. I find this illogical.”

These observations apply with equal force in this case. See *Nyahora v CFI Holdings (Pvt) Ltd* SC 81/14. In this case 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 misconduct. He was dismissed from employment and was asked to return the vehicle. He did not take heed as he persisted contesting dismissal. The employer respondent then successfully instituted *rei vindicatio* proceedings in court in dismissing the appeal by the appellant. ZIYAMBI JA (as she then was emphasised that in an action of *rei vindicatio* all that an owner needs to do is prove that he is the owner of the property and that at commencement of, claim the property to be vindicated was still in existence and the respondent was in possession of the property despite there being no legal basis because the contract which initially entitled the respondent has come to an end. See *Silvertondale (Pvt) Ltd* 1999 (2) SA 986 *Jolly Standon and Anor* 1998 (1) ZLR 78 AND *Stanbic Finance Zimbabwe v Chivhunga* 1999 (1) ZLR 262. The common thread that runs through the cases is that in *rei vindicatio* claim the owner need only prove that he is the owner and that the respondent is holding on or possessing the property without his consent. In this case the respondent has no basis or right of retention nor entitlement to the applicant's

property. It is not in dispute that the respondent a senior council employee was suspended and dismissed in terms of acceptable standard procedure with due process being followed. The position is that the respondent is not a council employee as at the time of institution of proceedings. The approval of the discharge by the Council Board in terms of s 139 of the Urban Councils Act does not in my view taint the rights of an owner to claim its property whenever, and from whoever is holding it without their consent. The contemplated challenge of the disciplinary authority and approval of Council Board does not clothe the respondent with entitlement to property which was issued to facilitate performance of duty. The employer-employee relationship has ended so has the basis for holding on to the employer's property. The respondent has no basis to retain the property from the date of suspension and subsequent dismissal. In the circumstances of this case the respondent ought to have returned the employer's property from the date of suspension as there was no basis to deprive the owner of their property.

The applicant sought for costs on a higher scale so did the respondent. Upon considering the circumstances of this matter the risk on holding over the property by the respondent might have been occasioned by a misapprehension that where the employee disputes termination then until the challenge is determined the employee should retain property. Further the import of s 139 on confirmation of discharge might have been misconstrued to mean approval occurs first as a condition precedent to the discharge. Whereas effectively it is proper and standard that suspension and disciplinary procedures occur first. As it appears in this case the respondent was suspended and relieved of duties by the disciplinary authority effectively stripping him off the right to retain property. Considering the totality of the circumstances of the matter it is my considered view that costs on a higher legal practitioner client scale are not called for. I will thus award costs on an ordinary scale.

Accordingly the application is granted.

It is ordered that:

1. The Respondent be and is hereby ordered to surrender possession of a red Foton Motor Vehicle Registration No. AAE 6811, Airtel Wifi Moderm Serial No. 5LL7517C22027996 and a Tel-One internet Moderm to the Applicant within 48 hours from the date of this order.
2. Should the Respondent fail to comply with para 1 above the Sheriff of Zimbabwe be and is hereby authorised to take the necessary steps to recover the said property from the respondent and surrender same to the applicant.

3. The respondent shall pay costs of suit.

*Mugiya and Muvhami Law Chambers*, applicant's legal practitioners  
*Sengwe Law Chambers*, respondent's legal practitioners