

NETONE CELLULAR
versus
REWARD KANGAI

HIGH COURT OF ZIMBABWE
MUZOFA J
HARARE, 29 September 2021 & 16 February 2022

Civil Trial – Special Case

E T Matinenga with A Chimhofu, for the plaintiff
T Biti, for the defendant

MUZOFA J: The defendant was employed by the plaintiff as its Chief Executive Officer. As part of his employment benefits, he was granted occupation of a property known as number 31 Shuttery Road, Greystone Park, Harare. The defendant's contract of employment was terminated in June 2017. Thereafter parties have been in and out of court regarding the legality of the termination. To date the issue has not been finally determined. Upon termination of the employment contract, the plaintiff sued out summons against the defendant for ejection, holding over damages including interest thereon and costs of suit on a higher scale.

The defendant opposed the claim and filed a plea in abatement and a counterclaim claiming damages arising out of some alleged defamatory statements published by one Alex Marufu an employee of the plaintiff. The plea was filed in November 2017. A month later in December 2017 the defendant pleaded over on the merits. His defence is two pronged. Firstly, he stated that he was entitled to some housing allowance. He was not paid such therefore he has fully paid for the house and claims transfer. I comment that this prayer is not even part of his counterclaim. Secondly, he said the termination of his contract was unlawful, he has challenged it. He is therefore entitled to remain in occupation. In due course the defendant filed a notice to amend the counter claim. In the amended claim the defendant challenges his termination and claims damages for the unlawful termination.

When the matter was set down for hearing, I invited the parties for case management, bearing in mind the number of cases pending in the Courts between the parties. Parties eventually agreed to proceed by way of a special case in terms of r52 of the High Court

Rules,2021. The issues referred for determination are set out in Part 6 of the statement ,which I summarize as follows,

6.1 Preliminary

Whether these proceedings must be stayed pending the determination of the application under HC 4580/21

6.2 Substantively

- I. The effect of the judgement under HH428/21 on the defendant's defence and counterclaim
- II. The legal status of the ruling by the labour officer T Sakarombe and its effect on the defendant's defence to the main claim
- III. Whether a labour officer's ruling creates any legal rights before confirmation by the Labour Court
- IV. Whether or not the defendant has a lien over the plaintiff's property
- V. Whether or not the defendant is liable to the plaintiff for holding over damages
- VI. Whether or not a dismissed employee is entitled at law to withhold the employer's property while challenging termination of his employment.

From the agreed issues for determination, it is apparent that parties did not include the substantive issues on the quantification of the holding over damages and the counterclaims. In my view this is because quantification of damages is a matter of evidence. The quantum must always be proved. These issues must be referred for trial. This is within the contemplation of the Rules. In terms of r152 (9) the court on giving its judgement may give "*any direction with regard to the hearing of any other issues in the proceedings which may be necessary for the final disposal thereof*". In terms of that rule it is possible to dispose of some issues and refer other issues to trial for determination. This approach is the most practical herein.

The Court cannot decide on the quantum of the holding over damages in a special case. It must be resolved on oral evidence. For practical purposes even if the parties referred the Court to deal with the defendant's liability for holding over damages. I prefer that the issue be dealt with compositely with the other issues.

In respect of the counterclaim, besides that the parties were mum on it, it is apparent that it is a claim for damages. Without making a substantive pronouncement on it, it is doubtful that

the respondent's counterclaim would succeed. Firstly this is a matter arising from the termination of defendant's contract of employment. The dispute was referred to a labour office and it is still to be resolved confirmed by the Labour Court. In addition the approach of our courts is that labour matters must be heard before the Labour Court. It is a special court whose made is to deal with employment disputes. The same reasoning on the claim for determination applies. The claim cannot be disposed in a special case. The court will refer to trial the claims for damages.

Background

The background to this case is necessary to put the claims into perspective. After the plaintiff sued out summons for eviction, the defendant filed a plea in abatement for stay of the proceedings pending determination of two cases in the High Court under HC 10400/16 and another only identified as HC11003 and resolution of a labour dispute before a labour officer T. Sakarombe. After the termination of his employment, the defendant had referred the dispute to a labour officer.

Before the matters were disposed, the defendant pleaded over on the merits and filed a counterclaim as stated before.

On 5 September 2019 the defendant sued the plaintiff jointly with others for defamation under HC 7395/19. The plaintiff (defendant in that matter) applied for the dismissal of the matter for being frivolous and vexatious under HC6150/20. The matter was heard before my brother JUDGE MANGOTA who dismissed the defendant's claim in judgement number HH 428/21. The defendant has since appealed the decision.

Meanwhile the matter referred to a labour officer was determined and T. Sakarombe made a ruling which was handed down on 23 May 2018. The ruling is in favour of the defendant (I will revert to the substantive findings in the ruling later in the judgement if necessary).

In terms of s93 (5a) of the Labour Act [Chapter 28:01] where a labour officer makes a ruling, he/she shall as soon as practicable make an application for the confirmation of the ruling before the Labour Court. Having handed down the ruling in May 2018, the labour officer failed to file the application with the Labour Court within thirty days prescribed in the Labour Court Rules¹. As a result, on 26 June 2019 an application for condonation for the late filing of an

¹ Rule 15 (4) of the Labour Court Rules , 2017

application for confirmation of the ruling was filed under LC/H/APP/413/19. For some reasons privy to the Labour Officer and probably the defendant the application was withdrawn on 10 September 2020.

The Labour Officer's ruling therefore remains unconfirmed.

Almost one year later, on the 9th of September 2021 the defendant filed a constitutional application under HC4580/21 in terms of which he seeks a declaration that s93 (5a) and (5b) of the Labour Act is unconstitutional and that he be granted leave to file an application for confirmation of the labour officer's ruling before the Labour Court. The matter is still pending. I must highlight that the constitutional application was filed after this matter was set down for hearing.

The plea in abatement fell away as at the time this matter was set down both matters had been determined.

Having set out the background I proceed to deal with referred issues.

Stay of proceedings

The defendant's submissions are that it is in the interests of justice and equity that this matter be stayed pending the determination of the constitutional challenge. The labour officer's ruling ordered that the defendant be paid an early release package in terms of the plaintiff's Human Resources Policy Handbook of November 2006. The award must be registered for enforcement purposes leading to payment. The defendant is owed therefore he is protected from ejection. A debtor – creditor relationship now exists between the parties. The Constitutional application does not seek to create any substantive rights; the defendant already has them. The constitutional application seeks to create a procedural enforcement mechanism for the realization of the substantive rights already held. A stay of proceedings will ensure that rights are not irretrievably lost. The defendant's rights have been pronounced and the plaintiff's rights are yet to be determined. In the event the defendant is ejected he will lose his lien². I was referred to authorities where it was held that a stay of proceedings will be granted where real and substantial justice demands that it be so granted³. Further to that it was submitted that the plaintiff has not shown that it will suffer irreparable harm should a stay be granted.

² Deputy Sheriff Harare v Sherwood (Pvt) Ltd 1998(2) ZLR 373 (HC)

²Deputy Sheriff Harare v Shewood (Pvt) Ltd 1998(2) ZLR 373(HC)

The plaintiff resisted the relief sought. The plaintiff took several issues that in the pleadings the defendant does not seek the stay of these proceedings pending determination of the constitutional question, that the application has no merit as the question has already been answered in **the Isoquant² matter**, that the defendant must have proceeded by way of s175 (4) of the Constitution for a referral instead of making a s85 application, that the application has no merit it was filed three days before the trial date to frustrate and vex the plaintiff. Finally, that the defendant could have enforced his rights by way of an application to compel registration some three years ago in 2018.

Generally superior courts have inherent jurisdiction to stay proceedings in certain circumstances where it is the interest of justice to do so. The power to do so is exercised sparingly for courts are open to all, every litigant has a right to prosecute their case. Proceedings may be stayed where they are frivolous and vexatious, where they may result in an injustice or an embarrassment to one or the other of the parties⁴.

The crisp issue for determination is whether it is in the interest of justice and equity to stay these proceedings pending the determination of the constitutional application. In the constitutional application the defendant seeks a declaration that s93 (5a) and ss (5b) of the Act is unconstitutional and that leave be granted to him to apply for the registration of the labour officer's ruling.

The basis upon which stay of proceedings is made is based on a misconception of the law on the status of a labour officer's ruling and the rights that arise therefrom. It is also based on a misconception of the substance of a lien as a defence. The defendant holds no rights arising from the labour officer's ruling. Similarly, he has no lien. The full reasons for my findings shall be set out later in the judgment as these are issues referred for determination by the parties.

I shall address some of the issues raised in opposing the stay of proceedings.

That the applicant did not seek the relief in its counter claim, can be answered by reverting to what is a special case and how the court must proceed.

³ Mupini v Makoni 1993(1) ZLR 80 (S)

⁴ Herbstein & Van Winsen, The Civil Practice of the High Courts in South Africa, 5th Ed

A special case is provided for in r52 of the Rules. It is a written statement of agreed facts done by the parties to a trial action for the court's decision on points of law. The court need not hear further evidence on the facts. The *Kunonga v The Church of the Province of Central Africa* SC 25/17 case is authority that the court cannot delve into the correctness or otherwise of the facts in dealing with a special case. Neither party can seek to reopen the agreed factual position or to contradict such position.

In *Future Murimi & Anor v Leathout Investments* HH 798/17 the court incisively dealt with the proper approach in dealing with a special case. Although the court was faced with a chamber application for directions in a special case, it laid down the applicable law. Where pertinent issues are not canvassed by the parties in the agreed statement of facts which in the court's view have a bearing on the issues for determination, the court is at large to make an appropriate order for parties to address the issue. The court in the *Murimi case (supra)* referred to the case of *Bungu & Anor v Makorudze & Anor* SC 39/15 where the Supreme Court remitted a case heard as a special case for the court to consider pertinent issues that arose in the case.

In this case, although the defendant did not seek the stay of proceedings in its counter claim, the court can still determine on the issue as it is relevant in the determination of the real issues between the parties. The parties have agreed to refer the issue for determination. The plaintiff cannot resile from the statement of agreed facts and seek to challenge that it initially consented to be determined. The issue taken is of no moment.

The second issue is that the constitutional issues have already been determined. This is incorrect. There have indeed been several concerted efforts to challenge the constitutionality of s93 (5a) and (5b) of the Act. Two matters come to mind where an attempt was made but the Constitutional Court found the applications improperly before it⁵. In those cases the court made obiter statements in relation to the sections, but no substantive order was made on the constitutionality of s93(5a) and (5b) of the Act. It would be a travesty of justice to make a finding that a constitutional issue was determined in obiter statements of the court. It is my finding that the issue raised by the defendant has not yet been determined.

I turn to consider the equities of this case. The defendant has indeed challenged his termination. A draft ruling was made in 2018. From then on to the time of writing the judgment the draft ruling has not been confirmed. In essence no rights accrue to the defendant. The

⁵⁵ Chiwaridzo , Isoquant Ibid

defendant did not diligently protect his rights. It was open to him to compel the labour officer to apply for confirmation by way of an application.

In my view the defendant stands to benefit from the continued occupation of the property as a result it is to his advantage to have this matter continuously held in abeyance to the prejudice of the plaintiff. I say this because when the plaintiff sued out summons the defendant filed a plea in abatement that the proceedings be stayed pending determination of pending matters. Meanwhile no cogent processes for the confirmation of the labour officer's ruling were taking place. Even after the application for condonation was withdrawn in the presence of his legal representatives, the defendant did nothing about the matter. The defendant was content with the state of affairs. It is disquieting that, it is only when this matter was set down for trial that the constitutional application was filed ,some three days before the trial.

I agree with the submissions made for the plaintiff, the constitutional application is meant to frustrate the plaintiff's case. The court cannot turn a blind eye to the reality that the defendant continues to benefit from his continued occupation of the property to the prejudice of the plaintiff. He obviously stands to benefit from the delays in the finalization of this matter.

Justice must be practical and aim at finality. In this case the constitutional court application will not better the defendant's counter claim in anyway. The constitutional application is still to be successfully prosecuted. Even if the defendant succeeds, it remains a suspended declaration until it is confirmed by the Constitutional Court. Thereafter the defendant has to approach the Labour Court for confirmation⁶.

The constitutional application has no effect on the claim for eviction. Even if s93 is declared unconstitutional. That will not give the defendant any right. Moreso even if the defendant would apply for confirmation of the labour officer's ruling confirmation of the ruling is subject to the court's findings. Confirmation proceedings are not a rubberstamping process, the Labour Court conducts a hearing. In the final even if the Labour Court confirms the labour officer's ruling that does not amount to a lien.

⁵Chiwaridza v TN Supermarket (Pvt) Ltd & Ors CCZ19/20, Isoquant

⁶ Section 175 (1) of the Constitution

These proceedings cannot be stayed based on some multilayered proceedings whose outcomes are uncertain. It is in the interest of finality to litigation and equity that the matter must proceed.

I deal with the issues referred for determination.

The effect of JUSTICE MANGOTA's judgment under HH428/21 on the defendant's defence and counter claim.

Under HC7395/19 the defendant sued the plaintiff and others for damages arising from certain statements published in the Herald Newspaper on 11 and 22 March 2016. Under HH6150/20 the claim was dismissed for being frivolous and vexation. An appeal was filed under SC322/21. In his counter claim the defendant sues the plaintiff for defamatory damages arising from one Marufu's statements published in the Herald Newspaper of the 11th and 22nd of March 2016.

I asked for the record under HC7395/19 for me to fully appreciate the claim that was dismissed. The record was retrieved but no meaningful pleadings were in the record. My take, without necessarily making a determination since I do not have all the facts, it appears the counter claim is similar to the claim that was dismissed by JUSTICE MANGOTA. The appeal is still pending before the Supreme Court. It is trite that an appeal suspends the order appealed. The matter is therefore still alive. The counter claim may suffer a still birth under these circumstances.

That as it maybe counsel did not address the issue from that perspective. According to the plaintiff the matter was disposed, and the counter claim cannot resuscitate it. The judgment is still extant. According to the defendant the issue does not arise. The MANGOTA judgment determined the matter on a technicality and the defendant is at large to approach the court on the same issue. It was not determined on the merits.

It is trite that an appeal suspends the operation of the order appealed. The position taken by counsel for the plaintiff that the MANGOTA judgment is still extant is untenable.

My finding is that the MANGOTA judgment is not relevant in the determination of this special case. This is so, because in this case the court will not address the counter claim on the defamation damages. It is a trial cause.

It would appear the defendant has thrown everything for the court to sift relevant issues. He has an unquenchable appetite for litigation. This is apparent from the casual response that despite the pending case before the Supreme Court the defendant can still sue out summons on the same cause because the matter was not decided on the merits. This is a wrong approach to litigation. Parties must aim for finality to litigation. The defendant could well prosecute his appeal and have the matter finalized.

Status of the labour officer's ruling.

Under this heading I will address the second, third and fourth issues as they are related. This will also apply to my finding in respect of the stay of these proceedings.

The submission made for the defendant that the defendant's rights have been pronounced by the labour officer, what remains is registration for purposes of enforcement is incorrect at law. The defendant is a holder of a ruling by a labour officer. It is neither appealable nor reviewable⁷. It remains a draft ruling subject to confirmation. Confirmation of a draft ruling is not registration for purposes of enforcement. In the *Isoquant* matter (supra) the court was clear that,

'The draft ruling is not capable of enforcement until it has been confirmed by the Labour Court. A draft ruling is not a determination as it is not preceded by a hearing.'

It is trite that what is not enforceable is not a right. A right is that which is enforceable. Where labour officer's ruling is confirmed, it ceases to be a draft ruling it becomes an order of the Labour Court. It is at this stage that an applicant holds an order that is enforceable by way of registration in terms of s93 (5b) of the Act.

It is therefore a misconception that a labour officer's ruling determines the rights of the parties. The defendant's rights are determined before the Labour Court. The Defendant is pretty in the same position as the plaintiff. Both parties' rights have not been determined.

There is no judgment creating legal rights in favour of the defendant. This is clear from the *Isoquant* judgment (Supra) at page 25 of the cyclostyled judgment that:

"A draft ruling does not determine the dispute whether made against an employer or employee, it does not confer any right until it is confirmed by the Labour Court."

⁷ Chiwaridza v TM Supermarkets Pvt Ltd & Ors Ibid

Despite that clear position, it was submitted for the defendant that the labour officer's ruling gives rights to the holder in terms of s93(5a). To use the term used in the submissions, it was said the provision makes the ruling enforceable by a non-coercive process. Novel as the argument is, I am unable to agree. Enforcement by its nature is by way of enlisting resources or mechanisms to a right holder to compel compliance. This is simply splitting of hairs. The real issue is that the ruling does not give rise to enforceable rights.

I turn to the question whether the defendant has a lien. A lien is a common law concept which gives the holder a right of retention where one has put money or money's worth in the property of another. The learned authors *Silberberg and Schoeman* discuss the different forms of liens⁸. They are generally divided into enrichment liens and debtor - creditor liens. The enrichment liens are regarded as real rights arising from either improvement or salvage liens. On the other hand the debtor – creditor lien rights,

‘...are conferred on a person who has done work on another's property or rendered a service in pursuance of a contract (other than in the course of employment)’⁹

The possessor of a lien has a right of retention until he is compensated. It does not give rise to a cause of action¹⁰. Where it is proved it is a valid defence in a claim for ejection or *rei vindicatio*. The right is anchored on possession of the merx, once possession is lost the right no longer accrues.

In this case it is apparent that the defendant holds no lien. No right accrues to the defendant based on the labour officer's ruling. No debtor – creditor relationship exists between the parties. As already stated the labour officer's ruling does not give rise to an enforceable right. Even if my finding maybe wrong, no lien arises from an employment contract. The authorities referred to by counsel for the defendant deal with the correct position of the law in respect of liens but they do not relate to a lien arising from an employment contract. They do not assist the defendant.

Accordingly, the defendant has no lien. There is no valid defence against the claim.

⁸ The Law of Property, 4th Edition

⁹ Ibid at p 389

¹⁰ Geoff's Motors (Pvt) Ltd v Lilfordia Estates Pvt Ltd 1995 (2) ZLR 342 (SC)

Whether a dismissed employee can at law hold on to the employer's property while challenging the termination of his employment.

According to the defendant the issue does not arise since the defendant does not resist the claim on the basis that he has challenged his dismissal. He challenges the claim on the basis that he has a lien. Obviously, the submission was made without properly considering the plea or the plea filed was conveniently not considered. The defendant's plea is clear that he resists ejection because his termination was unlawful, and he has challenged it. In fact on a proper consideration, the plea of a lien was not properly raised. I considered it for the sake of completeness as an issue that parties agreed to be determined. As already stated, the defendant simply raised a lot of dust by raising numerous issues in the submissions.

In these circumstances the position of the law is now settled. A dismissed employee has no right to the employer's property despite challenging the termination of employment¹¹. In this case the defendant resists the claim on the basis that he has challenged the termination. Even if he resists it on the basis that he is owed money by the plaintiff, I have already made a finding that he has no lien.

My finding on this issue is that the defendant has no lawful right to hold on to the plaintiff's property despite challenging the decision to terminate his contract.

The claim of rei vindicatio

On the substantive issue the plaintiff must be granted the order sought. The principles of the *actio rei vindicatio* are settled in our law. The owner of property has a vindicatory right against the whole world. It is a remedy available to the owner whose property is in the possession of another without his or her consent¹².

The principle of the *actio rei vindicatio* is that an owner cannot be deprived of his or her property against his or her will. All the owner is required to prove is that he or she is the owner and that the property is in the possession of another at the time when the action commenced.

¹¹ Chisipite Schools Trust (Pvt) Ltd v Clark 1992 (2) ZLR 224,ZBH v Gono 2010 (1) ZLR 8 (HC) ,Lafarge Cement (Zimbabwe) Ltd v Chatizembwa HH 413/18

¹² Mashave v Standard Bank of South Africa Ltd 1998 (1) ZLR 436 (S) at 438 C; Chetty v Naidoo 1974 (3) SA 13 (A) at 20 A-C

Proof of ownership shifts the onus to the possessor to prove a right to retention.¹³ The law protects the right to ownership to property jealously there are no considerations of equity¹⁴

In this case it is not disputed that the property belongs to the plaintiff. The Deed of Transfer is proof of such ownership. It is also not contested that the defendant was granted the right to occupation by virtue of an employment contract. The employment contract was terminated in June 2016. The defendant has challenged the termination but remains in occupation against the will of the plaintiff. The defendant has no valid defence.

All the requirements for the granting of the order have been satisfied.

In the result the following order is made,

1. Judgment be and is hereby entered for the plaintiff for the eviction of the defendant and all those claiming occupation through him from No 31 Shoterly Road Greystone Park , Harare.
2. The claim for holding over damages be and is referred to trial
3. The counter claim for defamatory damages is referred to trial
4. The counterclaim for damages arising from the employment contract be and is hereby dismissed.
5. Defendant to pay costs.

Messrs. Matsikidze Attorneys at Law, Plaintiff's Legal Practitioners
Messrs. Tendai Biti Law, Defendant's Legal Practitioners

¹³ *Zavazava & Anor v Tendere* 2015 (2) ZLR 394 (H) at 398 G.

¹⁴ *Nzara & Ors v Kashumba & Ors* SC18/18