CFI HOLDINGS LIMITED
versus
JORAM NYAHORA

HIGH COURT OF ZIMBABWE
CHIGUMBA J
HARARE, 9 July and 24 July 2013

Opposed Application

L. Uriri, for applicant
C Venturas, for respondent

CHIGUMBA J: This is an application for confirmation of a provisional order that was granted by this court on 16 October 2012. The order was granted by consent, on the following terms:

TERMS OF FINAL ORDER SOUGHT

That you show cause to this Honorable 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 return to applicant the motor vehicle, namely **BMW X5 Registration number AAX 8022** upon service of this order failing which the Deputy Sheriff be and is hereby authorized to take all and any such steps as may be necessary to recover the said motor vehicle from the respondent or any person whomsoever is in possession thereof on the authority of the respondent and return it to the applicant.
2. The respondent shall pay the costs of suit on the Law Society of Zimbabwe scale of Attorney and client.

INTERIM RELIEF GRANTED

That pending the determination of this matter on the return day, the applicant be and is hereby granted the following relief:

1. The motor vehicle namely a **BMW X5 Registration number AAX 8022** be and is hereby placed under judicial attachment.
2. The respondent be and is hereby ordered to surrender and return the motor vehicle to the Applicant's premises being c/o Victoria Foods (Private) Limited 83 Woolwich Road, Willowvale, Harare where it shall be kept/stored by the applicant pending the return day.
3. In the event of the respondent failing to comply with the terms of para 2 of this order, the Deputy Sheriff be and is hereby directed and authorized to take any and all such steps as are necessary to recover the motor vehicle from the respondent or any person whomsoever is in possession thereof on the authority of the respondent and return it to the applicant for purposes of compliance with para 2 of this order.
4. Both the applicant and the respondent are hereby prohibited/interdicted with immediate effect from driving, using or in any manner dealing with the motor vehicle and/or allowing any other person to do so except for purposes of complying with this provisional order.

SERVICE OF THE PROVISIONAL ORDER

The Provisional Order together with all supporting documents shall be served on the respondent or his Legal Practitioners and or the Deputy Sheriff.

The facts giving rise to this application are as follows:

On 2 October 2012, the respondent was found guilty, pursuant to disciplinary proceedings brought against him by his employer, the applicant in this matter, of the following charges:

Charge 1

> "An act, conduct or omission inconsistent with the fulfillment of the express or implied condition of the contract of employment in terms of section 4(a) of SI 15/2006".

Or, in the alternative

Gross incompetence or inefficiency in the performance of his works in terms of s 4(f) of SI 15/2006.

Charge 2

"Willful disobedience to a lawful order in terms of s 4(b) of SI 15/2006.

He was sentenced to dismissal from the date of his suspension, 3 August 2012. On the day of his suspension, the respondent had been directed by the applicant to surrender his company vehicle, a BMW X5 Registration number AAX 8022, which is now the subject matter of these proceedings. When he failed to surrender the motor vehicle as directed, the additional charge of willful disobedience to a lawful order was preferred against him by the applicant.

On 3 October 2012, when the disciplinary proceedings were concluded, the respondent was asked, in writing to surrender the motor vehicle to the applicant. He refused to do so. The applicant then filed an urgent chamber application on 10 October 2012 in which he sought the court's assistance to recover the motor vehicle from the respondent. The provisional order was granted by consent on 16 October 2012.

The issue that now falls for determination by this court, in considering whether to confirm the provisional order or to discharge it, is whether the applicant is entitled to the return of its motor vehicle, pursuant to the termination of the contract of employment, on 3 October 2012. In essence, the relief sought in the terms of the final order, constitutes an application for relief in terms of the common law remedy, of *rei vindicatio.*

The applicant contended that the court ought to be guided by the following cases:
Chetty v *Naidoo* 1974 (3) SA 13 @ 14 where it is stated that:

> "It is inherent in the nature of ownership that possession of the res 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 contractual right)."

The applicant also referred the court to the case of *Sanudi Masudi* v *David Jera* HH 67/07 @ p2-3 where it was stated that:

> "Based on the authorities, it appears to me settled at law that the *rei vindicatio*, being an action in *rem*, is only available to owners of the property in issue, which at the time of the

> commencement of the action, is in the possession of the defendant and the defendant fails to prove a right to retain the property as against the owner".

In *Stanbic Finance Zimbabwe LTD* v *Chivhungwa* 1999 (1) ZLR 262 (HC) MALABA J (as he then was), applied the principle of the *rei vindicatio* in respect of a motor vehicle owned by the plaintiff and leased to a buyer under a suspensive agreement of sale. In that matter, he referred to his decision a year earlier in *Jolly* v *A Shannon & Anor* 1998 (1) ZLR 78 (HC) where he had this to say at p 88.

> "The principle on which the *actio rei vindicatio* is based is that an owner cannot be deprived of his property against his will and that he is entitled to recover it from any person who retains possession of it without his consent. The plaintiff in such a case must allege and prove that he is the owner of a clearly identifiable movable or immovable asset and that the defendant was in possession of it at the commencement of the action. Once ownership has been proved its continuation is presumed. The onus is on the defendant to prove a right of retention*: Chetty* v *Naidoo* 1974 (3) SA 13 (A) at 20A-C; *Makumborenga* v *Marini* S-130-95 p 2. It follows that the action is based on the factual situation that prevailed at the time of the commencement of the legal proceedings."

It is common cause that the motor vehicle in question is currently registered in the name of CPG (Private) Limited, t/a Vetco, a wholly owned subsidiary company of the applicant. The respondent submitted that the applicant is not the actual owner of the vehicle and is precluded from bringing an application for vindication against him. With respect I cannot accede to that argument. The respondent cannot eat his cake and still have it. If we follow that argument to its logical conclusion, then respondent himself would not have a right to retain the vehicle because his contract of employment was with the applicant and not its subsidiary.

It is my view that respondent accepted the vehicle in terms of the company policy scheme with applicant, knowing full well that the registered owner of the vehicle was applicant's subsidiary company. I find the applicant has discharged the onus upon it, in an application for the remedy of *rei vindicatio,* that it is the owner of the vehicle in question, the res, through its subsidiary company, and that the res was in the possession of the respondent without applicant's authority or consent, at the time these proceedings were instituted, on 10 October 2012. The onus now shifts to the respondent, to prove that he has a right to retain the motor vehicle.

The respondent raised two issues in regards to its right to retain the motor vehicle in question. The first was that this court is not clothed with the requisite jurisdiction to resolve the

dispute between the parties, which in respondent's opinion is a labor dispute which falls under the exclusive jurisdiction of the Labour Court. The respondent relied on the provisions of s 89(1) (a) of the Labour Court [*Cap 28:01*] as authority for this proposition. Section 89(1) (a) provides as follows:

> "**89 Functions, powers and jurisdiction of Labour Court**
>
> (1) The Labour Court shall exercise the following functions—
>
> (*a*) hearing and determining applications and appeals in terms of this Act or any other enactment;

Section 89(6) provides that:

> "(6) No court, other than the Labour Court, shall have jurisdiction in the first instance to hear and determine any application, appeal or matter referred to in subs (1)".

The respondent contends that s 89(1)(a), as read with s 89(6), ought to be interpreted to mean that the Labour Court has exclusive jurisdiction to determine all matters relating to suspension from employment and termination of employment.

The applicant submitted that this issue has long been settled in a plethora of decided cases such as:

Zimbabwe Educational Scientific Social and Cultural Workers Union v *Claud Kaharo* HH 222/11, where this court stated in unequivocal terms that:

> "…A *rei vindicatio* action, which is rooted in common law, is certainly not one of those where the Labour Court enjoys jurisdiction …unless its jurisdiction has been specifically and expressly ousted by the legislature, this court has a concomitant duty to jealously guard against the erosion of its inherent jurisdiction. I am firmly convinced that this court enjoys its power to hear an action for vindication, because, as I said, this power falls outside the jurisdiction of the Labour Court".

My reading of s 89(1)(a), as read with s 89(6) is that the Labour Court enjoys exclusive jurisdiction, at first instance, in relation to all matters that may be classified as purely labour disputes, such as suspension from employment and termination of employments contracts, as correctly pointed out by Mr. *Venturas* for the respondent. However the applicant clearly states in its founding affidavit that it was applying for vindication of its property. The *rei vindicatio* cannot be termed to be a purely labour remedy which falls under the exclusive purview of the

Labour Act. The Labour Act, being a creature of statute may only do that which it is expressly authorized to do. This court, having inherent jurisdiction, may do anything except that which it is expressly prohibited from doing.

There is no exclusively provision of the Labour Act which expressly authorizes it to adjudicate in matters involving the *rei vindicatio*, which is a common law remedy. There is nothing in the Labour Act which expressly ousts this court's jurisdiction in regards to matters which, have aspects of labour disputes but in which common law remedies are sought. There is nothing in the High Court Act, or any other enactment which expressly prohibits this court from determination disputes involving the remedy of *rei vindicatio*. This court ought to guard against unscrupulous litigants whose clear intention is to subvert the provisions of the Labour Act by attempting to cloak the remedies that they seek as "common law remedies". Such attempts are readily discernible and as transparent as the emperor's new clothes. On the other hand, this court ought not to shy away from determining matters that fall within the four corners of its jurisdiction simply because those matters have aspects which may, on the face of it, be classified as labour disputes.

I find that there is nothing, in the papers before me, to persuade me that the relief sought by the applicant is one which ought to be determined exclusively by the Labour Court. Lastly, it is important to note that, by entering into an order by consent on 16 October 2012 when the Provisional Order was granted, respondent consented to the jurisdiction of this court.

The respondent's second submission was that it has a claim of right to the motor vehicle in question emanating from the applicant's company car scheme, and that, this claim of right has not been extinguished by the termination of his contract of employment, because his appeal against that termination is still pending before the Labour Court.

The applicant's company car scheme provides, in clause 5.2 thereof, that:

"The vehicle will be replaced on completion of four years of purchase".

In clause 6.2, the policy stipulates that:

"The vehicle user will be given the first option to purchase the vehicle on disposal time. Purchase price will be set by the Executive committee reviewed as necessary".

Clause 6.3 stipulates that:

"Should the user leave the company's employ or be dismissed prior to the vehicle completing 4 years; the vehicle shall remain the property of the company".

On the basis of these clauses, respondent averred that he had a legitimate expectation that the applicant would give him the first option to purchase the vehicle, because in 2011, the four year stipulated period lapsed, prior to respondent's dismissal in August 2012. The respondent contended further, that the issue of the validity of the termination of his contract of employment was pending before the Labour Court, and that, he was entitled to hold onto the vehicle until that issue was finalized. The respondent submitted, that he has noted an appeal against the termination of his contract of employment, which appeal is pending before the Labour Court, therefore, his claim of right as against the applicant was, not suspended by the noting of the appeal

As authority for this proposition, the respondent relied on the case of DHL *International (Pvt) Ltd* v *Madzikanda* 2010 (1) ZLR 201 @ 206. In my view, that case is distinguishable from the matter under consideration, on the facts. I am persuaded by applicant's submissions that respondent never acquired a right to purchase the motor vehicle in question. No offer was made to him by applicant to purchase the vehicle. There was no determination of the purchase price as provided for by the company policy. As such, no claim of right arises. A legitimate expectation does not amount to a claim of right. See *Dhege* v *Bell Medical Centr* HB 50/2004 where the court stated that:

> "… …the court cannot compel a party to exercise its discretion in a particular fashion. The court can compel a party to do what is mandatory in terms of an existing agreement. The right to purchase a company car could only be exercised after an offer had been made to the employee and not before. The option to offer for sale, cars used for employees was a privilege and not aright"

When regard is had to the relevant provisions of applicant's company policy scheme, the wording used is not peremptory. The intention clearly was to allow the applicant discretion whether to offer the vehicle to its employee, or not, at a price to be determined by a committee within the company. This had not been done at the time that the respondent was suspended, or at the time that he was dismissed, from employment.

In *FBC Limited* v *Energy Deshe* HH 285/11 @ p 1 it was stated that:

> "The respondent refuses to handover the vehicle to the applicant on the basis that he has appealed to the Labour Court against his dismissal. The respondent had also argued that this is a labour dispute and therefore this court has no jurisdiction to entertain the application. (See *Zimasco (Pvt) Ltd* v *Farai Maynard Marikano* SC181/10.

The court in the above matter made it clear that the respondent in that matter had no claim of right which was awaiting determination by the Labour Court. In *casu,* I find that the noting of the appeal did not suspend the decision to dismiss the respondent from employment. The provisions of section 92E of the Labour Act are quite clear on that point.

Section 92E (2) provides that:

"**92E Appeals to the Labour Court generally**
(1) …
(2) An appeal in terms of subs (1) shall not have the effect of suspending the determination or decision appealed against".

See *Kingdom Bank Workers Committee* v *Kingdom Bank Financial Holdings* HH 302/11 @ p 5. where it was stated that:

> "I fully agree with Mr. *Nkomo* that the provisions of section 92E are unambiguous and unequivocal in their scope and effect. They apply to every appeal in terms of the Act, including an appeal under s 98(10), and they operate to pre-empt and preclude the suspension of the decision appealed against. The common law presumption against the operation and enforceability of judgments appealed against has been explicitly ousted by section 92E…" See *Mududu* v *ARDA HH286-11, Sagittarian (Pvt) Ltd* v *Workers Committee, Sagittarian (Pvt) Ltd* 2006 (1) ZLR.

Finally, it is my view that the case of *Zimasco (Pvt) Ltd* v *Farai Maynard Marikano* HH 235/11 @ p 9 disposes of this matter as follows:

> "Clearly, for the respondent's defense to be sustained, he has to establish a claim of right over the applicant's assets. That he has failed to do. The assets, like the office which he duly vacated upon termination of employment, were placed in his hands in order for him to perform his duties as an employee of the applicant. Indeed there could have been ancillary benefits flowing from the use of those assets, such as personal use of the vehicle, but that fell away upon termination of employment – notwithstanding the challenge in the courts"

In the circumstances, I find that that the respondent has failed to establish a clear claim of right and cannot therefore lawfully hold onto the applicant's motor vehicle. The applicant has proved that it owns the motor vehicle and that the motor vehicle was in the possession of the respondent at the time that these proceedings were instituted, and that respondent has neither a claim of right, a statutory right or any contractual right to hold onto the motor vehicle, despite the noting of an appeal against his dismissal, to the Labour Court.

Accordingly the application for vindication ought to succeed. The provisional order granted by this court on 16 October 2012 be and is hereby confirmed. The respondent is to pay costs of suit.

Kantor & Immerman, applicant's Legal Practitioners
Venturas & Samkange, respondent's Legal Practitioners