FLOWERMET FARMING (PVT) LTD
versus
PATSON KUFA

HIGH COURT OF ZIMBABWE
MANGOTA J
HARARE, 11 February 2019 & 13 March 2019

Opposed Application

Ms *S. Khupe,* for the applicant
O.D. Mawadze, for the respondent

MANGOTA J: The applicant and the respondent enjoy(ed) an employer-employee relationship respectively. The same endured from March 2012 to May, 2015 or 1 June, 2018, if not beyond the stated date.

The applicant, in consideration of the respondent's status which was/is that of an accountant and administration manager, allocated to him a Ford Ranger, single cab motor vehicle registration number ACM 6923. The allocation was in terms of the contract of employment which the parties signed between them on 8 March, 2012.

The allocation of the vehicle to the respondent constitutes the applicant's cause of action. It applies to have the same returned to it. It insists that the respondent has no justification to retain the car. It avers that the contract which forms the basis of the allocation of the car to him no longer exists. It moves the court to direct, or compel, the respondent to return its car to it.

The respondent opposes the application. He raises a number of *in limine* matters after which he addresses the substantive aspects of the application. The following constitute the preliminary matters which he raised:

(i) <u>Jurisdiction:</u>

It is the respondent's statement that the car which is the subject of his dispute with the applicant was allocated to him in terms of his employment contract which still subsists.

The same falls to be dealt with under the Labour Act [*Chapter 28:01],* according to him. The court, he avers, does not have the requisite jurisdiction to deal with the parties' case.

(ii) Claim of Right

The respondent states that, because his contract of employment subsists, he has every right to remain in possession of the car. He insists that, until his contract of employment is lawfully terminated, the applicant cannot claim its car back.

(iii) Retention Lien

The respondent's averment under this head of defence is that the applicant owes him unpaid arrear salaries and terminal benefits which are in excess of $30 000 and/or close to $100 000. He insists that he has a *lien* over the motor vehicle pending payment to him of his arrear salaries and terminal benefits. He alleges, in addition to the above, that he has an improvement *lien* over the car. He says he improved the same to the tune of $3500.

(iv) *Res judicata*

The respondent avers that the applicant mounted the same application for *rei vindicatio* in the magistrate's court which dismissed the same.

The respondent's statement on the merits is substantially a repetition of the four *in limine* matters which I tabulated in the foregoing paragraphs. It is, therefore, not necessary for me to repeat the same.

It is common cause that the applicant allocated the car to the respondent in terms of the parties' contract of employment. Whether or not that contract still subsists remains debatable.

The applicant's statement on the stated issue remains incoherent. It says the contract terminated on 8 May 2015. It states, yet again, that the same terminated on 1 June 2018. Reference is made in the mentioned regard to para 8 of its answering affidavit as read with para 7 of its founding affidavit. The stated paragraphs appear at pp 37 and 4 of the record respectively.

The exact date that the respondent's contract of employment was terminated, if it was, remains elusive. The applicant states that the contract no longer exists. It relies on the judgment of CHIDZIVA J for its assertion.

The respondent avers that the employment contract still subsists. He places reliance on the judgment of HOVE J for the position which he takes of the matter.

The above mentioned Labour Court judgments lie at the centre of the parties' dispute. HOVE J's judgment was delivered on 18 November, 2016 and CHIDZIVA J's judgment is dated 1 June, 2018.

It is on the strength of the judgment of CHIDZIVA J that the applicant insists that the parties' contract of employment terminated on 1 June, 2018. It specifically relies on the portion of the judgment which appears at p 12 of the record. The portion reads:

> "It is this court's view that the labour officer and the Labour Court dealt with the issue of termination of employment and the benefits that the claimant (i.e. the respondent) was entitled to."

The above cited portion of the judgment which was delivered on 1 June 2018 cannot possibly be interpreted to mean that the parties' contract of employment terminated on the mentioned date. All it records is that, prior to 1 June 2018, the labour officer and the Labour Court dealt with the issue which related to the termination of employment and the benefits to which the respondent was entitled. It does not state, in concrete terms, that the labour officer and the Labour Court conclusively dealt with parties' stated issue..

Reading the cited words in context, CHIDZIVA J acknowledged the different interpretation which the parties were giving to the Labour Court judgments. It was for the mentioned reason, if for no other, that the learned judge remained of the view that the parties should have appealed to the Supreme Court or sought clarification from the Labour Court. Either course of action, it was her view, would have put their case to rest.

Both the applicant and the respondent are *ad idem* on the point that the Labour Court should spell out, in a clear and unambiguous language, the issue of whether or not the respondent's contract of employment is still subsisting. They have, for the mentioned reason, filed case number LC/H/APP/704/18. The case which is in line with CHIDZIVA J's acknowledgment of the challenges which the parties were/are confronted with in their interpretation of the labour court judgments is pending at the labour court. The pending case, it is hoped, will define the parties' contractual relationship to a point where it will require little, if any, debate.

Until LC/H/APP/704/18 is heard and determined, therefore, it cannot be said that the employer-employee relationship of the parties no longer exists. A *fortiori* given the respondent's

reliance on the judgment of HOVE J on the basis of which he insists that his contract with the applicant still subsists.

Because the meaning and import of the two judgments remain a cause of serious concern to the parties, the respondent's in *limine* matters on jurisdiction and claim of right cannot be said to be without merit. He insists that he is still within the employment of the applicant. It is on the strength of his contract of employment that the applicant allocated the car to him. He can only relinguish his possession of the car when the contract between the parties ceases to exist.

Given that the case of the parties remains pending at the labour court, as both of them state, the applicant's vindicatory application is prematurely before the court. The labour dispute of the parties must be concluded before the applicant institutes any application of the present nature. The court has no jurisdiction to deal with a matter the subject of which is pending at the Labour Court.

The respondent's defence of a lien is not available to him. He cannot have a debtor-creditor lien on the car because of the principle which the court enunciated in *Nexbank Investments (Private) Limited* v *Global Electrical Manufacturers (Private) Limited & Anor,* 2009 (2) ZLR 270 (S) at 274 B. That lien is available to a person who has, by contract, performed work or incurred expenditure on the property of another. The lien gives no right of retention over the property of the debtor which is in the possession of the creditor on which he has not actually performed the work in respect of which he claims payment.

The respondent's statement which is to the effect that he improved the car of the applicant which is in his possession cannot hold. It cannot hold for the simple reason that he does not substantiate his claim with documentary evidence. He, therefore, cannot retain the car on the strength of an alleged improvement lien.

That the parties appeared before the court of the magistrate with an application which is on all fours with the present application requires little, if any, debate. Annexures B and C which the respondent attached to his notice of opposition are self-evident. They appear at pp 29 and 34 of the record. Annexure C shows that the magistrate's court dismissed the *rei* v*indicatio* application with costs.

The order of the magistrate remains extant. There is no evidence which shows that the applicant reviewed or appealed it.

The respondent's defence of *res judicata* is, therefore, not without merit. The defence disposes of the present application in a definitive manner. The case of *Banda & Ors* v *ZISCO*, 1999 (1) ZLR 340 at 342 lays out the requirements which relate to the defence of *res judicata*. It states on the same that:

(i) the action must be between the same parties;

(ii) concerning the same subject matter – and

(iii) founded on the same cause of complainant as the action in which the defence is raised.

In *Madondo* v *Fyte and Others*, 1988 (1) ZLR 138 REYNOLDS J stated of the defence as follows:

> "It is trite that, in order for the special plea of *res judicata* to succeed, it must be established that the judgment given in the prior action concerned the same subject matter, was founded on the same grounds and was either a judgment in rem, or was between the same parties or their privies."

It is disquieting to observe that the applicant did not make any reference to the application which it filed in the magistrate's court for a vindicatory order. Its degree of dishonesty cannot be condoned let alone accepted. The fact that it only made an effort to refer to the same when the respondent raised it displays an absence of candidness on its part.

A litigant who brings a case to court must display an extreme degree of candidness. He should disclose all matters which are within his knowledge including those which are not favourable to his case. Only when he does so will he receive the court's sympathetic ear.

A litigant who chooses to withhold information which is detrimental to his case suffers the ignominy of being embarrassed when the correct facts come to the fore as occurred ***in casu***. Not only will the court not take him seriously. It will also find it difficult, if not impossible, to believe his story. His material non-disclosure of vital evidence attracts the court's censure in respect of his case.

Because the record of proceedings which the applicant attached to its answering affidavit remained under serious challenge by the respondent, no weight can be placed on the same. The authenticity of that record remains doubtful. It would not have been if the applicant had properly done its homework and attached it to its founding affidavit with some comments which rebutted the defence of *res indicate* in advance. Its attachment of the same to the answering affidavit renders the record, if such is one, devoid of any relevance to the application.

It is trite that an application stands or falls on its founding affidavit. Belated piece-meal solution to a difficulty which the respondent has raised in its opposing papers cannot assist the applicant at all. No weight can, therefore, be attached to the record which the respondent is seriously challenging.

The respondent succeeded in three of the four preliminary matters which he raised. The defences which he advanced are not without merit. The same dispose of the application in a conclusive manner.

The application is, in the result, dismissed with costs.

Coghlan, Welsh & Guest, applicant's legal practitioners
Mawadze & Mujaya, respondent's legal practitioners