BARZEM ENTERPRISES
versus
THABANI GONYE

HIGH COURT OF ZIMBABWE
MUSHURE J
HARARE, 7 March & 29 April 2025

Application for summary judgment

N. Katsande, for the plaintiff
L. Madhuku, for the defendant

MUSHURE J:

INTRODUCTION

[1] This is an application for summary judgment made in terms of r30 of the High Court Rules, 2021. For consistency, I propose to refer to the parties as they are cited in the main action.

[2] On 14 February 2023, the plaintiff issued summons against the defendant claiming delivery of a motor vehicle, namely a Ford Ranger registration number AEF 7621 ('the motor vehicle'), being a vehicle owned by the plaintiff and which, the plaintiff claimed, the defendant possesses without lawful cause. On 1 March 2023, the defendant filed a notice of entry of appearance to defend, followed by a plea on 31 March 2023. Believing that the appearance to defend and plea did not raise a genuine or *bona fide* defence, but had been entered for the purpose of solely delaying finalization of the matter and securing the defendant's unjustified possession and use of the plaintiff's property, the plaintiff launched the present application.

[3] The facts emerging from this suit are fairly simple and are largely common cause. I summarise them as follows: The defendant was in the employ of the plaintiff until the contract of employment was terminated through retrenchment. During the course of his employment, the defendant had been allocated the motor vehicle as part of his working conditions. The plaintiff now demands the return of the motor vehicle on the basis that by virtue of the termination of the contract of employment, all the employment benefits due to the defendant under the employment contract ceased.

[4] In defending himself, the defendant confirms that the motor vehicle is registered in the plaintiff's name and that it in his possession, but he insists that the motor vehicle now belongs to him following a retrenchment 'agreement' concluded between the parties on 21 September 2022. He argues that the parties are presently before a labour officer seeking a resolution of a labour dispute emanating from the retrenchment exercise. The motor vehicle is subject of the retrenchment dispute. He argues, further, that his possession is lawful and that in the absence of a court order setting aside the retrenchment 'agreement' of 21 September 2022, the plaintiff has no right to dispossess him.

[5] The defendant avers that the application for summary judgment is meritless. He contends that until the retrenchment dispute is resolved, this court cannot, through summary judgment proceedings, prejudge, or interfere with the labour dispute settlement machinery set out under our law. He submits that the agreed retrenchment package makes him the owner of the motor vehicle upon paying one third of its value. It is his submission that this court has no jurisdiction to pronounce itself on the meaning and effect of the retrenchment package of 21 September 2022.

ISSUES FOR DETERMINATION

[6] From submissions by the parties, it seems to me that there are essentially two issues that arise for determination. These issues are:-

[1] Whether or not this court has jurisdiction to deal with the present application; and

[2] Whether or not this matter is an appropriate matter to grant summary judgment.

I turn now to deal with these issues *seriatim*.

WHETHER OR NOT THIS COURT HAS JURISDICTION TO DEAL WITH THE PRESENT APPLICATION

[7] In the case of *Nhari* v *Mugabe & Ors* 2020 (2) ZLR 1062 (S) the Supreme Court had occasion to conclusively determine the question of whether or not the High Court has jurisdiction to deal with matters of labour and employment in the first instance. GARWE JA (as he then was) concluded that:

> "I reach the conclusion therefore that the High Court does not in fact enjoy the jurisdiction to deal with each and every civil and criminal matter in Zimbabwe. Whilst it has original jurisdiction to deal with such matters, such jurisdiction has been fettered and truncated by the Constitution itself which has made provision for the creation of specialised courts whose jurisdiction may, in the process, oust the original jurisdiction of the High Court in specific areas." (at p1072D-E)

[8] The import of this judgment is clear and unambiguous. Its effect is to decisively pronounce that the High Court does not enjoy unlimited jurisdiction in respect of all civil and criminal cases in Zimbabwe. The court held that the High Court does not, for instance, have jurisdiction to determine unfair labour practices which, in terms of the Labour Act [*Chapter 28:01*], should more properly be handled by labour officers appointed in terms of that Act.

[9] Therefore, to the extent that a dispute is one of labour and employment falling within the jurisdiction of the Labour Court, counsel for the defendant, Mr *Madhuku,* is absolutely correct on the settled position of the law regarding the limitation of this court's jurisdiction in such matters as clearly and definitively pronounced by the Supreme Court in the *Nhari* case *supra*.

[10] However, the Supreme Court has already pronounced in *Nyahora* v *CFI Holdings (Pvt) Ltd* 2014 (2) ZLR 607 (S) at p613A that-

> "As submitted on behalf of the respondent, the right of an individual to approach the High Court seeking relief, other than that specifically set out in s 89 1 (a) of the Act, has not been abrogated. Nothing in s 89(6) takes away the right of an employer or employee to seek civil relief based on the application of pure principles of civil law, except in respect of those applications and appeals that are specifically provided for in the Labour Act."

[11] If I have correctly understood the court's pronouncement in the *Nhari* case *supra*, then the settled position of the law as pronounced in *Nyahora supra* still holds true. I demonstrate this by a brief reference to the facts in *Nhari supra*. The appellant had brought a claim in the High Court against the respondents for outstanding wages and benefits due to him. One of the claims was for delictual damages for loss of employment prospects due to the public media denigrating his personality.

[12] In response to the claim, the respondents had filed a special plea in which they averred that the High Court had no jurisdiction to entertain the matter because it was a purely labour dispute in respect of which the Labour Court had jurisdiction in the first instance per the provisions of s89(6) of the Labour Act. After considering the matter, the High Court concluded that the application was steeped in labour law and therefore only the Labour Court had jurisdiction to determine them.

[13] While the Supreme Court was in no doubt that the powers of the High Court are not unbounded and that in the sphere of labour and employment law, the court does not have jurisdiction to determine such matters in the first instance, it went on to specifically interrogate whether the appellant's claim fell under the Labour Act. The court concluded that three of the claims were labour matters. It ruled that the claim for damages for loss of

employment prospects was not a labour matter and did not fall to be determined under the Labour Act.

[14] I find no reason not to adopt the same course of action in *casu*. As alluded to, the plaintiff claims the return of its motor vehicle which the defendant has on the basis of a terminated contract employment. The plaintiff argues that its claim is one of *rei vindicatio*. The defendant does not dispute this assertion. Instead, he accepts that the motor vehicle is registered in the plaintiff's name but argues that he now owns it.

[15] Accepting as I must that the claim before me is one for rei *vindicatio*, this remedy does not fall to be determined under the Labour Act. It cannot be argued that the right of the plaintiff to seek civil relief based on the application of a pure principle of civil law which is not provided for in the Labour Act has been ousted by the decision in *Nhari supra*. *Nyahora* supra settles the position that a claim for *rei vindicatio* falls squarely within the jurisdiction of this court.

[16] But, that is not the end of the matter. The defendant also raises an issue that the court cannot deal with this matter because there is pending labour dispute. From the papers filed of record, the defendant is not challenging the termination of his employment by retrenchment, he is challenging the plaintiff's refusal to pay what he terms the agreed retrenchment package. I have not been directed to any authority which supports the defendant's averments that I cannot deal with the claim for *rei vindicatio* because there is a pending dispute over the retrenchment package. I do not find any legal basis in that argument. This is a mere red herring. There is, in fact, a respectable body of authority to the effect that a dismissed employee has no right to the employer's property despite challenging the termination of employment. See for example *Netone* v *Kangai* HH 90-22, *Chisipite Schools Trust (Pvt) Ltd* v *Clark* 1992 (2) ZLR 224, *Zimbabwe Broadcasting Holdings* v *Gono* 2010 (1) ZLR 8 (H) and *Lafarge Cement (Zimbabwe) Ltd* v *Chatizembwa* HH 413-18. In this case, the defendant is not even challenging his retrenchment, he is challenging the retrenchment package.

[17] On the basis of the authorities coming out of this jurisdiction, I find that the defendant's argument that this court has no jurisdiction to deal with the plaintiff's claim either on the basis of this matter being a labour matter or on the basis that there is a pending dispute over the retrenchment package is without substance. I accordingly dismiss it.

WHETHER OR NOT THIS MATTER IS AN APPROPRIATE MATTER TO GRANT SUMMARY JUDGMENT

[18] Rule 30 (1) of the High Court Rules, 2021, provides for summary judgment in the following terms:

> "Where the Defendant has entered appearance to defend, the plaintiff may at any time before a pre-trial conference is held, make a court application in terms of this rule for the court to enter summary judgment for what is claimed in the summons and costs"

[19] Summary judgment is only available when the defendant's proposed defences are unequivocally lacking substance both in law and in fact[1]. As such, the relief enables a plaintiff with a clear case to get swift enforcement of its claim against a defendant without a real defence against the claim[2].

[20] The purpose of summary judgment cannot be further explained than as captured in *Pepukai* v *Zimi* 2020 (2) ZLR 263 (H) at 264F-H, 265A-E that;

> "[5] The objective of the summary judgment procedure was dealt with in *Bank of Credit & Commerce Zimbabwe Ltd* v *Jani Investments (Pvt) Ltd* 1983 (2) ZLR 317 (H) where the court remarked as follows,
>
> > "It is true that summary procedure is the principal means by which unscrupulous litigants seeking only to delay a just claim by entering appearance to defence, are thwarted. It is thus of the greatest importance that the efficiency of the procedure should not be impaired by technical formalism."
>
> See also *Rex* v *Rhodian Investments Trust (Pvt) Ltd* 1957 R & N 723 (SR), *Stationery Box (Pvt) Ltd* v *Natcon (Pvt) Ltd & Anor* 2010 (1) ZLR 227 (H), *Beresford Land Plan (Pvt) Ltd* v *Urquhart* 1975 (1) RLR 260 (A); 1975 (3) SA 619, *Chrismar Pvt) Ltd* v *Stutchbury* 1973 (10 RLR 277 (H).
>
> [6] The purpose of the summary judgment procedure is to enable a plaintiff who has an unanswerable case to obtain immediate relief by way of an application for summary judgment against a difficult defendant than having to wait for a matter to be dealt by with by way of trial proceedings in the ordinary course. The plaintiff is entitled to apply for summary judgment on a claim based on a liquid document, for a liquidated amount in money, for the delivery of specified movable property or for ejectment of a defendant. An applicant in a summary judgment application must show that the applicant has a *bona fide* defence to the action filed and has entered appearance to defend solely for the purposes of delaying proceedings. There must be no disputes of facts arising from the facts in which case, the plaintiff is entitled as a matter of law, to judgment.
>
> [7] The defendant must proffer a *bona fide* defence. He must set out his defence to the application with "such a degree of candour and particularity" as will enable the court to apply its mind to the *bona fides* of his defence: see *Mercantile Bank Ltd* v *Star Power CC & Anor* 2003 (3) SA 309 (T). In *Kingstons Ltd* v *L D Ineson (Pvt) Ltd* 2006 (1) ZLR 451 (S) at 458F, the court held that not every defence raised by the defendant will succeed in defeating a plaintiff's claim for summary judgment and held a *bona fide* defence to be:

---

[1] *Pitchford Investments (Pvt) Ltd* v *Muzari* 2005 (1) ZLR 1 (H) at p.1D.
[2] *Zimplastics (Pvt) Ltd* v *Corbett* 2014 (1) ZLR 68 (H) at p.75F

> "…a plausible case with sufficient clarity and completeness to enable the court to determine whether the affidavit discloses a bona fide defence. He must allege facts if established, would entitle him to succeed."
>
> See also *Jera* v *Nechipote* 1986 (1) ZLR 29 (S); *Mbayiwa* v *Eastern Highlands Motel (Pvt) Ltd* S-139-86
>
> [8] A defendant to summary judgment proceedings must disclose the nature of his defence and the material facts he relies on. He is not to deal with his case exhaustively and to prove his defence. See *Stationery Box (Pvt) Ltd* v *Natcon (Pvt) Ltd* 2010 (1) ZLR 277 (H). He must merely allege facts which, if he can succeed in establishing them at trial, would entitle him to succeed in his defence. He must disclose a *prima facie* defence and set out with such particularity so as to enable the court to make a decision whether he has a *bona fide* defence to the claim. See also *Hales* v *Doverick Invstms (Pvt) Ltd* 1998 (20 ZLR 235 (H); *Cargo Marketing International (Pvt) Ltd* v *Dynamic Afreight (Deutschland) GmbH* S-170-97."

[21] In *casu*, to make a conclusive determination whether the plaintiff has a clear case, it would be prudent to look into the requirements of the remedy of *rei vindicatio* which is being sought and further enquire whether the plaintiff has sufficiently satisfied the requirements for the granting of the remedy.

[22] Judicial authority in this jurisdiction has established the principle that the common law remedy of *rei vindicatio* is available to the owner of property who seeks to recover possession of such property from any person whatsoever. Essentially, the action can be enforced against the world at large[3]. The principle is predicated on the principle that an owner cannot be dispossessed of his property against his will and he is entitled to reclaim it from any individual who retains possession of it without his consent: *Eastlea Hospital (Private) Limited* v *Ndoro & Others* SC 116-23 at p7.

[23] The judgment of OMERJEE AJA (as he then was) in *Chenga* v *Chikadaya* SC7-13 lays out that for an applicant to be granted the remedy of *rei vindicatio*, he must prove two essential elements, namely proof of ownership of the property and secondly, possession of the property by the respondent. Once the applicant meets the above requirements, the onus shifts to the respondent to justify their possession of the applicant's property.

[24] The defences available to the respondent were aptly captured in *January* v *Maferefu* SC-14-20 at p. 7 as follows:

> "There are basically four main defences to a claim of *rei vindicatio* which are:
> (i) that the applicant is not the owner of the property in question.
> (ii) that the property in question no longer exists and can no longer be identified
> (iii) that the respondent's possession of such property is lawful
> (iv) that the respondent is no longer in physical control of the property – See the cases of *Chetty v Naidoo (supra)*[4] *and Residents of Joe Slovo Community v Thabelisha Homes* 2010 (3) SA 454 (CC)."

[3] *Hamtex Investments (Pvt) Ltd* v *King* 2012 (2) ZLR 334 (H) at 335B-C
[4] 1974 (3) SA 13 (A)

[25] In *casu*, it is not in dispute that the motor vehicle is registered in plaintiff's name. While our law is clear that a registration book is not proof of ownership (*Air Zimbabwe (Pvt) Ltd* v *Nhuta & Ors* 2014 (2) ZLR 333 (S)), it is not denied that the plaintiff owned the vehicle. It is also not in dispute that the motor vehicle is in the defendant's possession. What is in contention is the current status of that ownership. The defendant's submission is that the motor vehicle is now his following the 21 September 2022 retrenchment 'agreement'. Properly construed, the 21 September agreement is the basis for the respondent's ownership.

[26] At summary judgment, the task is to examine whether the defence forwarded by the defendant, that by virtue of the retrenchment 'agreement' dated 21 September 2022, he is now the owner of the motor vehicle, is plausible.

[27] My examination of the record shows that the defendant asserts that on 21 September 2022, a meeting transpired between the plaintiff and its employees, of which the defendant was a part of those employees. In the meeting, an agreement was reached to finalise the retrenchment on the basis of proposals contained in a letter dated 31 August 2022 and co-signed by plaintiff's representatives identified as *Vimbayi Nyakudya* and *Mbali Tshitenge.* Of particular relevance is paragraph 16 under the heading "Retrenchment package" of the 31 August 2022 letter, to the effect that:

> "16. The company is amenable to disposing allocated motor vehicles at one third of the market value to employees."

[28] From my reading of the aforementioned paragraph, the plaintiff was amenable to selling its motor vehicles to the allocated employees. The defendant has not indicated that such a sale eventually took place. Further, on record is a letter dated 29 September 2022, from the plaintiff to counsel for the defendant, written following the 21 September 2022 meeting. Regarding motor vehicles, the letter states that-

> "**Allocated Motor Vehicles**
> The eligible employees are entitled to purchase the Allocated Motor Vehicles at 80% of the Market Value as guided by the Board's resolution dated 24 August 2022 on the disposal of such motor vehicles."

[29] The contents of this letter are clear. Eligible employees were entitled to purchase motor vehicles at 80% of the market value. What I find striking is that the defendant has not presented before the court that he indeed purchased the motor vehicle. It is my view that the defendant's claim that he became the owner of the motor vehicle through the 21 September 2022 retrenchment 'agreement' has not been substantiated by solid facts. Besides making bare submissions that he acquired the motor vehicle by virtue of that

retrenchment 'agreement', the defendant has not provided any sufficient information to enable this court to assess his defence that he then became the owner of the motor vehicle, following the expression of the plaintiff's wish to dispose of the vehicles and the ensuing exchange of correspondences between the parties.

[30] The defendant has not taken this court into his confidence by failing to show that further than the discussions in the letters, a transaction to activate and complete the proposals took place. The defendant has not clearly demonstrated that by virtue of the agreement to dispose of vehicles to its employees, the plaintiff gave those employees the right to retain the vehicles or assume ownership of same on that basis alone.

[31] In my judgment, I find that the possible defence set up by the defendant is not *bona fide*, and not plausible. The defendant is raising fictitious issues of fact only meant to delay the resolution of the dispute to the detriment of the plaintiff. The defendant has no right of retention to the vehicle where there the employment contract has been terminated and the defendant is yet to purchase the vehicle but is challenging the terminal benefits arising from the retrenchment. I conclude this discussion with the pertinent remarks made by the court in *Medical Investments Limited* v *Pedzisayi* 2010 (1) ZLR 111 (H) at 116A-B that;

> "I am unaware of any law that entitles a prospective purchaser to have possession of the *merx* against the wishes of the seller, prior to delivery of the *merx* in terms of the sale agreement".

[32] I find that on the basis of the papers before me, the defendant cannot escape summary judgment.

DISPOSITION

[33] In view of the foregoing, it is ordered that;

1. The application for summary judgment be and is hereby granted.
2. Summary judgment be and is hereby entered in favour of the plaintiff and against the defendant as follows:
   i. The defendant delivers a Ford Ranger registration number AEF 7621 to the plaintiff's business address within forty-eight (48) hours of this Order.
   ii. In the event that the defendant fails to comply with the order in (i) above, the Sheriff be and is hereby empowered to seize the motor vehicle referred to in (i) above from the defendant without notice.
   iii. The defendant shall pay costs of suit.

MUSHURE J: .....

Maguchu & Muchada, plaintiff's legal practitioners
Lovemore Madhuku Lawyers, defendant's legal practitioners