AFRICAN SUN LIMITED t/a ELEPHANT HILLS RESORT
VICTORIA FALLS HOTEL, GREAT ZIMBABWE HOTEL
AND KINGDOM HOTEL
versus
BEATRICE MARAMBA
and
BERNARD MAKIWA
and
BEST DUBE
and
CHARLES NCUBE
and
ENOCK CHUNGU
and
GODKNOWS ZIMBOVORA
and
MTOKOZISE SIBINDI
and
MTANDAZO SHOKO
and
NOMORE KUMBIRAI
and
SHAMISO NYONI
and
TAONA MARANGE
and
BOND MASENDU
and
EPIPHANIA MANDIZVIDZA
and
ERNEST MLAMBO
and
CONCILIA TSHUMA
and
MALITI NGWENYA

and
MUSIYIWA MHANGE
and
SHUPE NGWENYA
and
SIBUSISIWE SIZIBA
and
SIPINDIWE MOYO
and
ACFORT MACHOKOTO
And
CHRISTOPHER MATHE
and
EDWIN MOYO
and
ENIA SIBANDA
and
FREEDOM SIBANDA
and
HENRY NYAMAYARO
and
KELVIN MOYO
and
MAVIS NYONI
and
TOKOZILE MANGENA

HIGH COURT OF ZIMBABWE
BACHI MZAWAZI J
HARARE, 9 March 2022

Opposed Application

Mr J Bakasa…….for the applicant
Mr M. Gwisai …….for the respondent

BACHI MZAWAZI J, The applicant, a duly incorporated company in terms of the laws of Zimbabwe runs a conglomerate of hotels under the umbrella name of African Sun Limited. Being in the hospitality industry, the applicant was one of the casualities of the world wide unprecedented catastrophic socio-economic ripple effects of the Covid 19 pandemic. The labour market was not spared either and was one of the hardest hit. Within this background, the applicant made a decision to retrench most of its workforce across the board, amongst them the twenty nine respondents herein. During the tenure of their employment contracts the respondents had the right to occupy the applicant's residential properties. However, after the termination of the said contract they refused to vacate the same claiming that they had a right of retention arising out of an appeal they had launched in terms of the Labour Act, challenging both the legality and package of their retrenchment.

As a result of the stalemate, applicant caused summons to be issued against the respondents individually, to vindicate its properties. The respondents entered their appearances to defend and filed their pleas. It is the respondents' pleas that triggered the launching of this application for summary judgment by the applicant. Applicant claims that, the plea is dilatory, discloses no bona fide defence and is nothing but a delaying tactic.

Since the respondents had been sued individually ,an application for the consolidation of all the respondents for the purpose of this application, was sought and granted by MUNANGATI MANONGWA J in case HC 2606/21, on 15th of June 2021.

The background facts are largely common cause suffice to state that, the Applicant is the employer and the respondents are the employees who have been stationed at various locations country wide. On the 28th of August, 2020, the applicant laid off some of its labor force as earlier stated. Retrenchment packages were negotiated through the representatives of the workers, approved by the retrenchment board and subsequently paid to all the employees in question. Whilst most of the retrenched employees vacated the applicant's residential properties, a benefit arising out of the contract of employment, the respondents remained in occupation. The respondents claimed that their labour appeal entitled them to stay. As a result, the applicant's properties have allegedly deteriorated in state and have accrued considerable amounts in utility bills. Hence, the commencement of litigation by the applicant.

It is important to note that in their summonses the applicants only claimed for the eviction of the respondents with costs. However, in the current application, what they have sought are damages in lieu of accrued, unpaid utility bills and withholding over damages in respect of every property and against each respondent. The utility bills pertaining to the property occupied by each and every respondent herein have been attached and are not disputed. The only challenge raised by the respondents is that the receipts are not liquid documents.

In their opposing affidavit and at the onset of the hearing, relying on the authorities *DHL v International (Pvt) Ltd v Madzikanda 2010* ZLR (1) 201and the case of *Zimtrade v Makaya 2005 (1)* ZLR 427 (H*),* the respondents had raised a preliminary objection stating that the jurisdiction of this court to determine the Common law principle of *rei vindicatio* has been ousted by s89(6) 6) of the Labour Act {Cap 28:01} , which confers exclusive jurisdiction to the labour court in all matters concerned or linked to labour matters. Commendably, counsel for the respondent abandoned the *point in limine* upon being confronted with a litany of jurisprudential pronouncements which have put the issue to rest, it having been a well traversed path culminating

in Appellate Court decisions. See, *Medical Investments v Pedzisayi 2010 (1) ZLR 11 (H), Montclair Hotel and Casino v Farai Makuhwa,* HH501/15 and *Nyahora v CFI Holdings (Pvt) Ltd* S-81/14.

On the merits the applicants pointed out that since the respondents had abandoned their preliminary objection and made concessions based on the decided cases cited above they no longer have a leg to stand on. They contend that, the case of *Montclair Hotel and Casino*, above MATHONSI J (as he then was) spelt it out in no uncertain terms, that an employee, whose contract has been terminated had no right to hold on, possess or continue in occupation of the employer's property even when there is pending litigation in any Labor forum prescribed by the Act. As such they motivate the court to grant their application for Summary judgment arguing that their claim is unassailable and the respondents have no bona fide defence on the merits.

Citing the cases of *Lafarge cement (Zimbabwe) Limited v Mugove HH 413/18 and Medical Investments v Pedzisayi 2010 (1) ZLR 11 (H) (supra),* applicant, submits further, that, they own the property which is in the possession of the respondents, as such the right of the respondents to reside at the property ceased with the termination of the contract of employment. Further, they argue that, contrary to the submissions made by the respondents' counsel, it is established law that an appeal to the Labor court does not give the retrenched workers any right to remain onto the employer's property. They also state that, in any event, in terms of s92 (E) of the Labour Act Chapter 28:01, an appeal to the Labour Court does not suspend the decision appealed against.

Applicants further enunciates that the respondents must be ordered to pay the utility bills although this was not claimed in their main action on the basis that there are receipts from the respective Local Housing authorities with actual figures which need no further computation and quantification. It is their argument that these receipts are liquid documents and capable of being resolved without leading evidence. They advance the same argument on holding over damages

insisting that they are easily ascertainable and can be disposed of without the need of evidence for their quantification.

In their submissions on the merits the respondents maintained that even in the face of their concession that this court has the jurisdiction to determine the common law concept of *rei vindicatio* notwithstanding the appeal in terms of the Labour Act, they have a bona fide defence in that, their pending appeal entitles them to remain in occupation of the applicant's property until its finalization. They urge the court to dismiss the application and accord them the chance to defend their matter and have their day in court. Further, they challenge in passing without elaboration the propriety of equating holding over damages to liquidated claims. Although they did not dispute the amounts of the utility bills reflected on the receipts attached to the application, they still allege entitlement to the services that gave rise to the bills.

Given the above set of facts and submissions what then needs to be established is,

1. Whether the respondents have a bona fide defence and the appearance to defend has not been entered for the purposes of delay?
2. Whether the applicant has made a case for summary judgment?

In deciding, whether or not the respondents have a bona fide defence and that the appearance to defend has not been entered for the purposes of delay it is essential to revisit their plea. Their bona fide defence as encapsulated in their plea in verbatim is,

> para 3.admitted. Defendant's right of occupation is derived from the parties' contract of employment but denies that such contract was lawfully terminated… the contract of employment was not lawfully terminated and the defendant still possess the right to occupation of the premises until the dispute on the lawfulness of his dismissal is fully and finally determined in terms of the Labour Act.

As is required in an application for summary judgment, the applicant must do more than simply assert that he has a good claim, that he believes that the defendant has no *bona fide* defence

and that the defendant has entered an appearance to defend solely for the purpose of delay. This was enunciated in the case of *William Nyanga versus Zimbabwe Housing Projects Trust, HH-24/18.*

In their submissions on the merits, the respondents maintained that they have a bona fide defence in that they have the right of retention, to be in occupation of the company properties until such time their appeal with the Labor Court and other related fora, have been determined. Counsel for respondents canvassed that their arguments for the *point in limine* applies to those on the merits. In their view, the position that an ex-employee has a right of retention over the former employer's property once an appeal has been lodged and pending has already been settled by the decisions it has since relied on in its preliminary objection, particularly, *DHL v International (Pvt) Ltd v Madzikanda 2010* ZLR (1) 201and the case of *Zimtrade v Makaya 2005 (1)* ZLR 427 (H)

On analysis it is evident that the respondents acted on a misapprehension of the accurate legal position as to the dispute in question. I am inclined to agree with counsel for the applicants that had the respondent taken heed this matter would not have seen the light of the court. . It is settled law that an employee whose contract of employment has ceased, has no right of retention to hold on, possess or occupy the property, a benefit arising from the terminated contract even if there is an appeal pending in terms of the Labour Act. In the case of *Montclair Hotel*, MATHONSI J,(as he then was), whilst expressing his displeasure at the ineptitude of some members of the bar in their failure to appraise themselves in new legal jurisprudential development, asserted that,

> " It is the owner of the property which was given to the respondent by virtue of an employment contract which has now come to an end, whether the respondent is challenging the termination or not is immaterial, an owner is entitled to vindicate."

Making reference to *Joram Nyahora v CFI Holdings Private Limited SC*, 81/2014, the learned judge in Montclair hotels, above, proceeded to comment that,

> 'The Supreme Court has long confirmed a position long held by this court in respect of such matters.'

Further the Supreme court in *CFI Retail Pvt Limited V Eric Masese Manyika, SC 8/2016*, thwarted the respondent's argument that in terms of the Labor Act an appeal to the labour court suspends the appealed decision by holding that, "in terms of s92 (E) an appeal to the Labour court does not suspend the decision appealed against"

Clearly, under these circumstances this becomes an open and shut case as the supreme court decision in *Nyahora* case,*supra*,.clearly spoke to this case. It endorsed the right of an employer to evict his former employee from his property when the labor contract has been terminated even if the employee had challenged his dismissal. The Supreme Court decision, *in Nyahora* addressed both the Common law right, of vindication of the employer and the fact that the pending of appeal is neither a right of retention nor a defence.

It cannot be labored that, in the current scenario, what this translates to is that the respondents have no bona fide defence on the merits of this case. In turn their plea is dilatory entered into to delay the day of reckoning. In my view this could have been the end of this matter, but for the completeness of record there is need to interrogate the second issue.

Turning to consider, whether the applicant has made a case for summary judgment an exposition of the law governing such application is necessary. It follows that, the relief for Summary judgment is governed by rule 30 of S.I 202 of 2021, which was rule 64 of the 1971 High Court rules against the bedrock of numerous decided cases. It is an extraordinary rule that is granted sparingly as it conflicts with the doctrine of *ad alteram partem rule.* It was a safeguard measure or a mechanism devised to protect and ensure speedy finalization of litigation in

circumstance where dishonorable litigants have no answerable defence but would want to simply frustrate an opponent's claim through delaying tactics. This was amply captioned by TAKUVA J in the case of *Bronson v Bronson HB24/20,*when he quoted the dictum in *Majoni* v *Ministry of Local Government And National Housing* 2001 (1) ZLR 148 (S), wherein, the Court stated that;

> "The principles applicable in a summary judgment application have been well documented. The quintessence of this drastic remedy is that the plaintiff whose belief it is that the defence is not *bona fide* and entered solely for dilatory purposes should be granted immediate relief without the expenses and delay of trial …" see also *Pitchford Investments(Pvt) Ltd* v *Muzariri* 2005 (1) ZLR (H)."

HUNGWE J, as he then was, in the case of *William Nyanga versus Zimbabwe Housing Projects Trust, HH-24/18,* commented that,

> " 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 efficacy of the procedure should not be impaired by technical formalism."

Rule 30 of S.I 202 of 2021, reads;

(1) Where the defendant has entered an appearance to defend, the plaintiff may, at any time before a pretrial conference is held , make a court application in terms of this rule for the court to enter summary judgment of what is claimed in the summons with costs.

(2) ……...and stating that in his or her belief there is no genuine defence to the action and that appearance to defend has been entered solely for purpose of delay.

Of note, are the following cases, *Beresford Land Plan (Pvt) Ltd v Urquhart* 1975 (1) RLR 260, 265/272B,*Chrismar (Pvt)* v *Stutchbury & Anor* 1973 (1) RLR 277,*Mbayiwa* v *Eastern Highlands Motel* SC/139/86,*Jena v Nechipote* 1986 (1) ZLR 29 (S) and *National Railways of Zimbabwe* v *Verigy Enterprises (Pvt) Ltd & 3 Ors* HB13/17 amongst many others.

As has already been noted, in the present suit, and is an undisputed fact is that the applicants, an employer and owner of the residential properties in the possession and occupation of the respondents, their retrenched employees, felt obligated to seek their eviction through due process of the law. It is only after the respondents had filed their plea that they then invoked the protection proffered by rule 30, of the current rules, then rule 64 of the old rules to expedite the expulsion or removal of the same through the doctrine of *rei vindicatio.* What the doctrine of rei vindication, which is of Roman origin simply entails is that it is an action which enables an owner of property in the possession of another, without his sanction and consent to recover the same. It is meant to protect the proprietary rights of individuals against third parties. See, **L, Wenger,Institutes of Roman Law ,trans, & Harrison Fisk (rev) (**ed 1986) 109. This was also well captioned by MATHONSI J, in,*Lafarge cement (Zimbabwe) Limited v Mugove HH 413/18,* wherein he noted that,

> The principles of *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 an owner whose property is in possession of another without his or her consent…… indeed 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 he or she is the owner and that the property is in the possession of another at the commencement of the action. Proof of ownership shifts the onus to the possessor to prove

DISPOSITION

It suffices to conclude from the foregoing and in addition to a finding already made , that the respondents had failed to demonstrate that they have a bona fide defence to the applicant's claim, I am satisfied that the applicants have made a case for summary judgment. The applicant

have the right to reclaim possession of their properties. As such all the respondents, individually, have no legal right to remain in all the properties belonging to the applicants, hence, they must vacate. All rights to the said premises which they had accrued ended with the termination of their employment relationship.

However, I am of the view that I cannot be drawn to make a finding on two new grounds for relief which were not part of the claim in the summons. Rule 30(1) specifically limits the relief sought in an application for summary judgment to that claimed in the summons. The applicant although they propagated that the utility bills attached , are self-explanatory and are to be equated to liquid documents they did not allege them in their summons. Both parties did not develop their arguments in that respect. In my considered opinion, the quantifications of both the utility bills and the holding over damages need to be properly articulated quantified and pleaded. The cases of *Dennis Ndebele v Local authority Pension Fund, HB-162-18 and Maseko vNdlovu*,HB20-2016, are cases that address what can be incorporated as a liquid document and the documents that can be attached to an application of summary judgment in terms of rule 30(2) of the 2021 High Court rules.

As regards the issue of costs, the applicants prayed for costs at a higher scale on the basis that the respondents where forewarned therefore forearmed, that the old legal order as represented by the *Madzikanda and the Makaya* cases supra, on the contested issue, had been superseded and developed by new legal dispositions from the Appellate Division of this jurisdiction but they persisted resulting in more unwarranted costs on the part of the applicant.

I would not agree more to the sentiments advocated by applicants taking into account the prolonged legal battle and the other expenses incurred. An award of costs at legal practitioner client scale will be justified in the circumstances.

Accordingly, it is ordered that:

1. Application for Summary judgment succeeds in part.
2. That 1st to the 29th respondents together with all those claiming occupation through them shall vacate within 15 days of the date of this order the applicant's premises listed on the schedule attached hereto, failing which the Sheriff of Zimbabwe be and is hereby authorized to evict 1st to the 29th Respondents and all those claiming occupation through them.
3. The 1st to the 29th respondents shall pay the cost of suit on an Attorney and client scale, jointly and severally each paying the other to be absolved.

Nyamayaro, Makanza & Bakasa Attorneys for the applicant
Matika Gwisai and Partners for the respondents

ANNEXURE TO THE DRAFT ORDER

SCHEDULE OF ADDRESSES, UTILITY BILLS AND HOLDING OVER DAMAGES

1. 1st Respondent Beatrice Maramba to be evicted from 8 Dale Crescent, Victoria Falls.
2. The 2nd Respondent Bernard Makiwa to be evicted from 8 Sunrise Flats, Victoria Falls and is to pay ZW %8 586.09 in utility bills and ZW $49 680.00.
3. The 3rd Respondent Best Dube to be evicted from 4275 Chinotimba Township, Victoria Falls and is to pay ZW 4 419.38 in utility bills.
4. The 4th Respondent Charles Dube to be evicted from 4330 Chinotimba Township Victoria Falls and is to pay ZW $ 8 843.00 in utility bills.
5. The 5th Respondent Enock Chingu to be evicted from 4281 Chinotimba Township, Victoria Falls.
6. The 6th Respondent Godknows Zimbovora to be evicted h 4297 Chinotimba Township, Vctoria Falls and to pay ZW $8 841.23 in utility bills.
7. The 7th Respondent Mkotozise Sibindi to be evicted from 4321 Chinnotimba Township, Victoria Falls and to pay ZW $ 8 841.23 in utility bills.
8. The 8th Respondent Mtandazo Shoko to be evicted from 4858 Chinotimba Township, Victoria Falls and to pay ZW 8 841.23 in holding over damages.
9. The 9th Respondent Nomore Kumbirai to be evicted from 4263 Chinotimba Township, Victoria Falls and to pay ZW $ 3 182.58 in utility bills.
10. The 10th Respondent Shamiso Nyoni to be evicted from 4331 Chinotimba Township, Victoria Falls and to pay ZW $ 4 337.27 in utility bills.
11. The 11th Respondent Taona Marange to be evicted from 4933 Chinotimba Township, Victoria Falls and to pay ZW $ 4 418.74 in utility bills.
12. The 12th Respondent Bond Masendu to be evicted 614BNemanwa Township, Masvingo.

13. The 13th Respondent Elphania Mandizvidza to be evicted from 512A Nemanwa Township, Masvingo.
14. The 14th Respondent Ernest Mlambo to be evicted from 614A Nemanwa Township.
15. The 15th Respondent Concillia Tshumba to be evicted from 4937 Chinotimba Township, Victoria Falls and to pay ZW $ 4 369.56 in utility bills.
16. The 16th Respondent Maliti Ngwenya to be evicted from 4325 Chinotimba Township, Victoria Falls and to pay ZW $ 1 795.40 in utility bills.
17. The 17th Respondent Musiyiwa Mhange to be evicted from 4329 Chinotimba Township, Victoria Falls and to pay ZW $ 1 333.67 in utility bills.
18. The 18th Respondent Shupe Ngwenya to be evicted from 4941 Chinotimba Township, Victoria Falls and to pay ZW $ 4 369.56 in utility bills.
19. The 19th Respondent Sibusisiwe Siziba to be evicted from 4424 Chinotimba Township, Victoria Falls and to pay ZW $ 2 201.69 in utility bills.
20. The 20th Respondent Sipindiwe Moyo to be evicted from 4331 Chinotimba Township, Victoria Falls and to pay ZW $ 4 369.56 in utility bills.
21. The 21st Respondent to be evicted from Achfort Machokoto occupying 4875 Chinotimba Township, Victoria Falls and to pay ZW $ 1 961.74 in utility bills.
22. The 22nd Respondent Christopher Mathe to be evicted from 4285 Chinotimba Township, Victoria Falls and to pay ZW $ 4 080.00 in utility bills.
23. The 23rd Respondent Edwin Moyo to be evicted from 35 Sunrise Flats, Victoria Falls and to pay ZW $ 8 585.00 in utility and ZW $ 3 105.00 in holding over damages.
24. The 24th Respondent Enia Sibanda to be evicted from 4903 Chinotimba Township, Victoria Falls to pay ZW $7 176.00 in utility bills.

25. The 25th Respondent Freedom Sibanda to be evicted from 4298 Chinotimba Township, Victoria Falls and to pay ZW $ 4 369.00 in utility bills.
26. The 26th Respondent Henry Nyamayaro to be evicted from 4285 Chinotimba Township, Victoria Falls and to pay ZW $4 080.00 in utility bills.
27. The 27th Respondent Kelvin Moyo to be evicted from 4726 Chinotimba Township, and to pay ZW $ 2 556.00 in utility bills and ZW $ 1 050.00 in holding over damages.
28. The 28th Respondent is Mavis Nyoni to be evicted from 4366 Chinotimba Townshipm Victoria Falls and to pay ZW $ 4 368.50 in utility bills.
29. The 29th Respondent Tokozile Mangena to be evicted from 4907 Chinotimba Township, Victoria Falls and to pay ZW $ 6 384.00 in utility bills.