

MEDICAL INVESMENTS LIMITED
versus
RUMBIDZAYI PEDZISAYI

HIGH COURT OF ZIMBABWE
MAKARAU JP
Harare 14 January and 10 February 2010.

OPPOSED APPLICATION

Mr I Chagonda for applicant
Ms R Nemaramba for respondent.

MAKARAU JP: The applicant and the respondent were employer and employee respectively. The respondent was employed by the applicant as its Chief Pharmacist with effect from 1 December 2002 up to November 2008. It was a specific term of her employment that the respondent would be entitled to the use of a motor vehicle during the course of her employment. At the time of her joining the applicant, there was no policy in place regulating the use and entitlement to the vehicle. Such was put in place later and there is no dispute between the parties that it applied to the respondent.

In terms of her contract of employment, the applicant was allocated a VW Polo registration number AAG 1727.

On 30 October 2008, the respondent wrote to the applicant, giving notice of her intention to resign from employment. In her letter, she indicated that her last working day would be 17 November 2008. She indicated that she had some days that had accrued to her as leave which she intended to forfeit in lieu of the requisite notice period. It may be pertinent to note at this stage that while the parties wrangled for some time as to whether the respondent had given adequate notice or not, that dispute is not before me and has since been resolved. The status of the respondent as a former employee of the applicant is thus not in dispute.

On 14 November 2008, three days before her last working day the respondent wrote to the applicant seeking to clarify her calculation of the notice period she had given

to the applicant. In the second paragraph of the letter she wrote that she was entitled to purchase the motor vehicle in her possession. It is not clear on the papers how this issue had arisen.

On 17 November 2008, the respondent left the employment of the applicant taking the motor vehicle with her. The applicant, not being persuaded that the respondent was entitled to retain possession of the vehicle after the termination of her employment, wrote to the respondent requesting her to surrender the vehicle. The respondent did not return the vehicle maintaining that she was entitled to purchase the vehicle. This prompted the applicant to file this application seeking an order compelling the applicant to surrender the vehicle to it.

The application was opposed. In opposing the application, the respondent objected to the jurisdiction of this court, arguing that the dispute between the parties is essentially a labour issue over which the Labour Court has exclusive jurisdiction. Further, the respondent argued that notwithstanding that her last working day was in November 2008, she remained an employee of the applicant until her notice period had run out and as at the time she left employment, the applicant's motor vehicle policy applied to her, entitling her to purchase the vehicle. She further alluded to an agreement between the parties wherein the applicant's agent had agreed that the applicant would sell the vehicle to her and that the only remaining issue to be agreed upon was the currency in which the transaction was to be concluded.

I will deal with each of the issues arising from the respondent's opposing affidavit.

The issue of when the jurisdiction of this court is ousted in favour of the exclusive jurisdiction of the Labour Court has been before this court in a number of instances. In my view, it is the settled position at law now that the jurisdiction of all other courts is excluded in matters where the Labour Court has been granted specific jurisdiction by the Labour Act, {Chapter 28:01}, ("the Act"). (See *Tuso v City of Harare* 2004 (1) ZLR 1 at 3F (H) and *Zimtrade v Malord Makaya* HH 52/05).

The issue that falls for determination in this application is whether the dispute before me is a dispute that the Labour Court has exclusive jurisdiction.

Section 89 (6) of the Labour Act 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 subsection (1)”

Section 89 (1) provides:

(1) The Labour Act shall exercise the following functions-

- (a) hearing and determining appeals in terms of this Act or any other enactment and
- (b) hearing and determining matters referred to it by the Minister in terms of this Act and
- (c) referring a dispute to a labour officer, designated agent or a person appointed by the Labour Court to conciliate the dispute if the Labour Court considers it expedient to do so;
- (d) appointing an arbitrator from the panel of arbitrators referred to in subsection (6) of section *ninety-eight* to hear and determine an application;
- (d1) exercise the same powers of review as would be exercisable by the High Court in respect of labour matters;
- (e) doing such other things as may be assigned to it in terms of this Act or any other enactment.

In interpreting these two sections of the Act, this court has, in the authorities I have cited above, held that the Labour Court has exclusive jurisdiction in all applications and matters that are not only defined but are determinable in terms of the Act. In other words, the Labour Court has jurisdiction in all matters where the cause of action and the remedy for that cause of action are all provided for in the Act.

In all other matters, where the cause of action and the remedy are at common law, the jurisdiction of this court is not ousted.

It is common cause that the applicant and the respondent are no longer employer and employee respectively. The resignation of the respondent as applicant’s Chief Pharmacist is not in dispute. The dispute between the parties centres on the possession of the applicant’s motor vehicle to which the respondent claims a right.

While it has to be accepted that the respondent’s claim of right to the motor vehicle arises from her terminated contract of employment with the applicant, this is far cry from holding that there is a labour dispute between the parties that can find a remedy

or resolution in terms of the Act. The resolution of the dispute between the parties is not entwined with the resolution of the contract of employment as was the case in *Zimtrade v Makaya* (supra) where, pending determination of the contract of employment, the employer sought to repossess its assets from the employee using the *rei vindicatio*. It appeared to me then to be the correct position at law that where the validity of the suspension of the employee or the termination of their employment is still pending, the *rei vindicatio* could not properly lie at the instance of the employer. I am still of the same view. On the contrary, where the status of the former employee is without dispute, the *rei vindicatio* can lie at the instance of the employer in appropriate cases and the matter thereby falls outside the purview of the Labour court as it is not a matter that can be heard or determined in terms of the Labour Act or any other related enactment. It is my view that the *rei vindication* is not a cause of action whose remedy can be granted in terms of the Act as a stand alone remedy in the absence of a dispute that is specifically provided for under the Act.

On the basis of the foregoing, I would dismiss the point *in limine* raised by the respondent and hold that the jurisdiction of this court over this matter remains.

I now turn to the second issue.

The applicant seeks an order compelling the respondent to surrender to it possession of the motor vehicle that was allocated to her during the course of her employment. The respondent has opposed the order on the basis that she is entitled to purchase the motor vehicle. She argues, and validly so in my view, that she exercised the option to purchase the motor vehicle during the subsistence of her employment with the applicant.

It is common cause that the applicant's motor vehicle policy provided in clause 5 thereof that a vehicle allocated to an employee would be replaced after 4 years and that such a vehicle would be sold to the user at 50 % of its market value if the user opted to purchase the vehicle. It is also not in dispute that the vehicle allocated to the respondent had reached its retirement age and further that the respondent indicated her option to purchase the vehicle before she left employment, albeit during the very last days of her

employment as if the purchase of the vehicle was an afterthought. That the respondent has the right to purchase the motor appears to me not to be above reproach.

In its founding affidavit, the applicant deposed to its belief that the respondent was not entitled to purchase the motor vehicle in dispute as she has resigned when she Purported to exercise her right as given under the contract of employment.

The applicant was erroneous in its belief in this regard. As correctly conceded by *Mr Chagonda* during the hearing of the matter, the respondent exercised her option to purchase the motor vehicle whilst still an employee of the applicant and the applicant is bound to sell the motor vehicle to her. In this regard, reference has to be made to the letter of the respondent of 14 November 2008 wherein she inelegantly referred to her entitlement to the vehicle without specifically spelling it out that she was electing to purchase the vehicle. The option was however exercised and when it was exercised, the respondent was still an employee of the applicant. It is common cause that she ceased to be an employee on 17 November 2008 and not before.

The issue that remains for my determination in this matter is whether the respondent is entitled to retain possession of the motor vehicle pending the finalization of the agreement of sale between the parties.

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. I was not referred to any such law during the hearing of the matter. My limited research has not yielded any.

I am aware that in some instances, where there is an amicable relationship between the parties, for instance where the employer-employee relationship still subsists or was amicably terminated, the seller may allow the prospective purchaser who is already in possession of the *merx* to retain possession pending finalization of the sale. Another instance that immediately suggests itself is where a tenant purchases the leased property from the landlord. Such a tenant may remain in occupation pending finalization of the agreement of sale and transfer. An analysis of the two examples I have given above will reveal that they are borne out of consent. They cannot thus be cited as precedent for

creating any right or entitlement on the part of similarly circumstanced prospective purchasers to enforce possession against the wishes of the seller. Where the arrangement obtains in my view, it is simply an incidence of an owner willingly parting with possession of his property pending transfer of ownership in favour of the possessor. Such willingness on the part of the seller cannot be compelled by an order of court.

On the basis of the foregoing, I am of the view that notwithstanding my finding above that the respondent has the right to purchase the motor vehicle in question in terms of the provisions of the applicant's motor vehicle policy, she is nevertheless not entitled to retain possession of the vehicle against the wishes of the applicant pending the finalization of the agreement of sale.

In the result, I make the following order:

1. The respondent or any person possessing through her shall, upon service of this order, surrender to the applicant a motor vehicle, namely a VW Polo, registration number AAG 1727 failing which the Deputy Sheriff is hereby empowered to take possession of same and hand it over to the applicant.
2. The respondent shall bear the costs of this application.

Atherstone & Cook, applicant's legal practitioners.

Kawonde & Company, respondent's legal practitioners.