

QUARRYING ENTERPRISES PRIVATE LIMITED
versus
CORNELIUS ABRAHAM SMIT
and
ZACHARY DYLAN SMIT

HIGH COURT OF ZIMBABWE
CHIGUMBA J
HARARE, 3 and 23 March 2016

Opposed Application

F. P Machini, for applicant
C. McGowan, respondent

CHIGUMBA J: This is an application for an order that the respondent deliver to the applicant, a motor vehicle Mitsubishi Pajero registration number ACA 9480 and a Toyota Landcruiser pick-up truck, registration number ABO 8962, within twenty four hours, failing which, that the Deputy Sheriff be authorized to recover the said motor vehicles, with the assistance of the Zimbabwe Republic Police should it be required, and to deliver same to the applicant, as well as costs of suit. The basis of the application in terms of the founding affidavit is that the respondents' employment contracts with the applicant have been terminated. It is common cause that the vehicles belong to the applicant, as further buttressed by the attached registration books which show that the vehicles are registered in the applicant's name. At the hearing of the matter the application was granted with costs, the court being of the view that the issues raised in opposition had no merit because the Supreme Court had already given adequate guidance on the same issues. Not surprisingly given the conduct of legal practitioners these days, we were asked to provide written reasons for holding this view, for purposes of appeal. These are the reasons.

The background to this matter is that the first respondent was employed by the applicant in 2005 as its managing director, and the second respondent as its mine manager. The respondents were dismissed from employment, and they appealed against their dismissal to the Labour Court. On 6 February 2015 applicant demanded the return of the vehicles from the respondents. It is common cause that the respondents have failed to surrender the said vehicles, to date. The issues that arise for determination are simple (the same issues have been settled by the same judge in the matter of *ZCFU v Nyamakura* HC 2319-15). This fact is mentioned for the reason that guidance on these issues has already been given by the Supreme Court. It is hoped that litigants and their legal representatives take the time to acquaint themselves with the guidance coming from the Supreme Court. In formulating the matters for determination in a matter materially similar to the one under consideration, the Supreme Court stated that;-

“This appeal deals with the oft recurring question whether an employee whose contract of employment has been terminated, and who has appealed to the Labour Court against that termination, is entitled, pending resolution of the appeal, to retain a motor vehicle allocated to him for the performance of his duties during the course of his employment. It also addresses the question of the jurisdiction of the High Court in these circumstances to grant relief to the employer under the *rei vindicatio*. See *Joram Nyahora v CFI Holdings Private Limited*¹.”

At the hearing of the matter, when attention was brought to counsel for the respondent to the abovementioned case, he implied that this matter differs materially, on the facts, from *Nyahora v CFI supra*. Let us examine the facts of this matter. The respondents in their opposing affidavit filed of record on 16 April 2015 aver that the applicant was started as a family business, and although there has been an attempt to terminate their contracts of employment they are pursuing all other legal avenues to ensure that the applicant returns to being a family business. It is common cause that the Labour Court has dismissed the respondents’ appeal against their dismissal for being defective and not properly before it. The respondents aver that they allowed some Italian nationals to join the family business started by their late father and grandfather and that as a result they have been deposed in a boardroom coup. The opposing affidavit is of no assistance to the court because it alludes to events which have been overtaken by other events.

In these circumstances, do the respondents have a right of retention of the motor vehicles in question? In my view, the facts bring this matter squarely on all fours with *Nyahora v*

¹ SC 81-14

CFI supra. It is common cause that the respondents' contracts of employment were terminated and that their appeal was dismissed for want of form by the Labour court. The applicant is proceeding in terms of the *rei vindicatio*. The question of jurisdiction to hear such a claim has now been conclusively determined in our favor as follows:-

“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. Nor is there contained in s 89 any provision expressly authorizing the Labour Court to deal with an application, such as in the instant case, for the common law remedy of *rei vindicatio*. Such applications fall squarely within the jurisdiction of the High Court. *Nyahora v CFI supra*.²”

On the merits of such an application, this is the guidance given by the Supreme Court:-

“The action *rei vindicatio* is available to an owner of property who seeks to recover it from a person in possession of it without his consent. It is based on the principle that an owner cannot be deprived of his property against his will. He is entitled to recover it from any one in possession of it without his consent. He has merely to allege that he is the owner of the property and that it was in the possession of the defendant/respondent at the time of commencement of the action or application. If he alleges any lawful possession at some earlier date by the defendant then he must also allege that the contract has come to an end. The claim can be defeated by a defendant who pleads a right of retention or some contractual right to retain the property. *Nyahora v CFI supra*.³”

The real issue that falls for our determination is whether the respondent has a claim of right within the context of the *rei vindicatio*, of such scope that it is capable of defeating the applicant's right to recover the motor vehicle in question from him. Again we have been guided as follows:-

“...unless the contract specifically states so, a court ought to be careful not to read a legal right into a policy matter which is for the discretion of the employer. In my judgment the question of a right to purchase could only arise after an offer had been made to and accepted by, the employee to purchase the vehicle and not before”. See also *Arundel school Trust v sally Pettigrew*⁴.

The contract which is being referred to is the contract of employment. The claim of right must arise from the terms of the contract of employment which governed the parties rights and liabilities and stipulated what ought to happen in case the contract of employment was terminated. The respondents have not averred that they have a claim of right. They are operating under the legal misapprehension that the issue of the termination of their contract of employment

² Page 7

³ Page 7

⁴ HC 613-12

is still pending before an arbitrator. The horse has already bolted before the respondents closed the stable doors. As a matter of law, the respondents stand dismissed. Their contracts of employment were terminated, at law. There is no claim of right capable of defeating a vindicatory action. As a mark of its displeasure at the respondents' conduct of resorting to self help, clinging onto property which was issued to them in terms of a contract of employment which has been terminated, and persisting in this matter when the issues have been conclusively determined by a higher court, we order them to pay costs on a higher scale.

For these reasons, it be and is hereby ordered that;-

1. The respondents or any person in possession of the applicant's property namely a Toyota Landcruiser pick up, registration number ABO8962, and a Mitsubishi Pajero station wagon registration number ACA 9480 issued by the applicant to the respondents, be and is hereby directed to surrender the said property to the Deputy Sheriff upon service of this order.
2. In the event that the respondent or any person in possession of the aforesaid vehicle fails to comply with this order, the Deputy Sheriff be and is hereby authorized to seize and attach such property and hand it over to the applicant.
3. The respondents shall pay the costs of this application on a legal practitioner and client scale.

Gula-Ndebele & Partners, applicants' legal practitioners
Venturas & Samkange, respondent's legal practitioners