

ZIMASCO (PVT) LTD
versus
FARAI MAYNARD MARIKANO

HIGH COURT OF ZIMBABWE
MTSHIYA J
HARARE, 5 July 2011 & 26 October 2011

R. Moyo, for applicant
Mr Kanengoni, for respondent

MTSHIYA J: This is an application for vindication. The application was first argued before me on 11 March 2010 and on 21 July 2010, I ruled that the High Court had no jurisdiction since the matter before me was a labour dispute. The applicant appealed against my ruling and on 31 January 2011 the Supreme Court issued the following order:-

“IT IS ORDERED THAT:

1. The appeal be and is hereby allowed with costs.
2. The order of the High Court is set aside with costs.
3. The matter be remitted to the High Court for determination before the same Judge”

It is in compliance with the above order that this judgment is being prepared.

The order sought in the application for vindication reads as follows:

- “1. Respondent shall within two hours of the service of this Order on him restore the following property to the applicant.
 - (a) Mitsubishi Pajero 3.0 Registration Number AAV-5956;
 - (b) Laptop HP Compaq 6720;
 - (c) Cellphone Samsung D880.
2. The cost of this application shall be borne by the respondent”.

For the purposes of consistence, I reproduce here-below the background to the application in the same manner that I did in my judgment of 21 July 2010 when I refused to grant the relief indicated above. I gave the background as follows:-

“The relief sought arises from the fact that upon termination of employment the respondent retained the applicant’s property which is being claimed in the relief quoted above. It is common cause that prior to 18 September 2009 the respondent was employed by the applicant as its Health Services Manager. The respondent’s employment was terminated on grounds of ill-health through an internal memorandum dated 18 September 2009. The memorandum reads as follows:-

'I acknowledged receipt of your memo dated September including medical reports from your doctor (Mr Macheke) and some clinical psychologist (Mr Broomberg).

The letter from Mr Macheke is very clear in stating that your ill-health is such that you will not be able to resume your job after the legally stipulated one hundred and eighty days. Mr Macheke states clearly, in reference to yourself that:

'He needs more time off work for a full resolution of his injuries though at this point one cannot state a definite time-frame and will depend on future reviews and assessment in 2 months' time' .

You have now exceeded your maximum sick leave in one year period of service (that is, from 11 March 2009 to 14 September 2009). It leaves the company with very little option, therefore, than to terminate your contract of employment forthwith (that is, with effect from 18 September 2009) in accordance with s 14(4) of the Labour Act [*Cap 28:01*]"

Please note that due to your failure to obtain your doctor's certificate by 17 July 2009 as had been instructed and as re-iterated in previous communication to you, you have forfeited your chance of being terminated through the company's medical boarding process.

You are thus instructed to surrender all company assets in your possession to the General Manager Shurungwi not later than close of day on Monday 21 September 2009, For avoidance of doubt the said assets include the company PAV, laptop, cellphone and line. Failure to surrender the said company assets will result in the company instituting any legal process necessary to recover any such assets.

Your terminal benefits which include any outstanding salary and leave days up to 18/09/09 will be deposited into your account provided an exit form has been duly completed clearing you of any outstanding liabilities to the company. Your pension benefits from both the Zimasco Pension Fund and NSSA will be processed in the normal manner".

Paragraph 6 of the above memorandum refers to the property that the applicant wants the respondent to return to it. The respondent admits that the property belongs to the applicant but refuses to release the property on the ground of unfair dismissal.

In his opposing affidavit the respondent states as follows:-

- '1. I wish to raise a point *in limine*. It is common cause that on 9 October 2009, I instituted proceedings in the labour Court challenging the applicant's decision to terminate my employment contract summarily, see copy of proof of service and copy of the application of review and appeal attached hereto marked annexures (A), (B) and (C).

2. It is common cause that those proceedings are still pending and have not been disposed of.
3. There is, accordingly, a litigation pending between the parties on the same cause of action and in respect of the same subject matter in the Labour Court and this honourable court should decline to exercise its jurisdiction as this is purely a labour matter which should be dealt with and has been properly placed before the Labour Court’.

The respondent further declares:

“I will state that I am in possession of the items pending the settlement of the matter as stated in above Ad para 3.

The respondent therefore urged the court to dismiss the application”.

The above is the background to this application for vindication.

When the hearing commenced following the Supreme Court order, I asked the parties to file supplementary heads of argument on the following issue:

“Whether or not the Honourable Court could ignore the development that have taken place between the parties in the labour dispute”.

In raising the above issue my mind was focused on the Labour Court ruling of 18 March 2011 wherein the labour Court set aside the applicant’s decision to terminate the respondent’s contract of employment. The applicant is now challenging the decision of the labour Court in the Supreme Court. That is where the matter is now pending.

In response to the issue that I raised the applicant had this to say:-

- “6. The fact that the labour dispute between the parties is constantly developing is one of the major reasons why this Honourable Court should not be detained by the developments in that matter. An attempt by this Honourable Court to make its decision in this matter on account of the developments in the Labour dispute is akin to an attempt to build a permanent structure on shifting sands. This argument is developed below.
7. The very fact that there have been subsequent developments in the labour dispute means that his Lordship’s question must be revisited. It is submitted that whilst his Lordship’s question may remain the same, the fact is that the landscape which his Lordship was looking at, at the time that he posed that question has since changed.
- 17(i) This Honourable Court, by exhibiting an interest in the developments in the Labour Court is about to fall into the same error that it did in July 2010. A direction has already been issued by the Supreme Court of Zimbabwe to this

Honourable Court. It is unfortunate that there is no judgment that was written by the Supreme Court. What is apparent, however, is that the Supreme Court has directed this Honourable Court to the effect that what is before it is not a Labour dispute and that it must dispose of this matter as a vindication matter without regard to the alleged Labour dispute between the parties which could be developing in the Labour Court.

- 17(ii) The position above is anchored on the fact that the matter before this Honourable Court is a vindication application. This arises from the applicant's ownership of the property that it seeks to recover from the respondent. The applicant has established ownership of that property. The respondent has not exhibited any right to those assets which override the applicant's ownership right. Instead, in opposing the application for vindication the respondent led this Honourable Court into its error by persuading this Honourable Court to accept that what was before it was a labour dispute"

The applicant went on to state that the respondent had never established a defence to the claim for vindication. It was argued that the respondent had merely concentrated on the issue of jurisdiction which had now been determined by the Supreme Court.

The applicant went further to submit on relevant issues as follows:-

- 17(iv) Related to the point above is the fact that a distinction needs to be made between the rights arising from ownership and the respondent's rights arising from his employment. Even assuming, for a moment that the respondent were to be reinstated. It is submitted that, that would not disable this Honourable Court from granting the vindication application herein. The respondent, at most, in terms of his employment contract may be entitled to use of a motor vehicle, to a laptop and cellphone in furtherance of the Employer's business which are the property of the Employer. The employment contract does not entitle him to a particular motor vehicle and in this instance the Mitsibushi Pajero 3.0 Registration No. AAV-5956 or the laptop HP Compaq 6720 or the cellphone Samsung D880 presently in the respondent's custody.
- 17(v) His personal use of these items is incidental. This is different from the scenario where the items are purchased by the Employer for and on behalf of the Employee and registered in the name of the Employee".

For his part the respondent correctly submitted that the Supreme Court had indeed made a determination on the issue of jurisdiction and then went on to state the following:-

- "6. It is an accepted defence to a claim for vindication to establish a claim of right in respect of the property sought to be vindicated. A claim of right is defined in Black's Law Dictionary, 5ed as *inter alia*,

‘Claimant’s intention to claim in hostility to real owner’

7. It is not in dispute in this matter that the owner of the property, subject matter of the claim for vindication, is the applicant herein. It is also common cause that the claim is made consequent to the averment by the applicant that it dismissed the respondent from employment and consequently can recover its property from him.
8. Conversely it is common cause that the respondent herein successfully challenged his dismissal in the Labour Court and that though the applicant has been granted leave to appeal to the Supreme Court against the judgment of the labour Court, the appeal itself has not yet been noted.
9. A countenance of the above depicts two differing positions taken by the parties herein: the applicant alleges herein that in consequence of dismissing the respondent it is entitled to vindicate whilst the respondent alleges that in consequence of the finding of the Labour Court he is entitled as of right to retain the property in question.
10. This therefore, constitutes, on the part of the respondent, an intention to claim in hostility to the real owner, thus establishing the defence of claim of right.
11. Such perspective would still apply even if the applicant herein were to eventually file its notice of appeal in the Supreme Court because, as defined above, the defence is established by the intention to claim in hostility to the real owner and not the success of that claim. It is common cause that any appeal noted by the applicant in the Supreme Court against the labour Court decision will be opposed by the respondent thus establishing his intention to claim contrary to the real owner.
12. Sentiments echoing this perspective were made by the court in the of *ZIMTRADE v MALORD MAKAYA HH 52-2005* wherein the court noted as follows:

‘It is in my further view, unacceptable splitting of hairs to separate the determination of the validity of a suspension from employment, on one hand, from the determination of whether or not that suspension affects the benefits enjoyed by the employee, on the other hand. The two are interdependent and are both governed by the existing employment relationship obtaining between the two parties. The argument that the employer can vindicate his property at any time does not impress me as the employee can always raise the defence of a claim of right to possess the property until he or she is effectively and lawfully disentitled to the property’ (emphasis added).
13. The remarks stated in the *ZIMTRADE* case (*supra*) vis-à-vis jurisdiction are no longer applicable in this matter in consequence of the order of the Supreme Court, however that does not detract from the efficacy of the remarks made therein in respect of the defence of claim of right, which defence would still apply even where this honourable court relates to the matter on the merits. The

ZIMTRADE case is a case relied upon by the respondent in the initial hearing of this matter and therefore constitutes part of the record and the prespective outlined above as to the defence of claim of right cannot be taken to be a novel position on the part of the respondent.

14. Further examination of the quotation herein above from the ZIMTRADE case particularly where it relates to 'effectively and lawfully disentitled', is necessary. Such disentitlement cannot be viewed to the exclusion of the labour matter between the parties herein. The conclusion of that labour matter will amount to the effective and lawful disentitlement of the respondent to the property should the intended appeal be decided in the applicant's favour.
15. Before that happens however, and as long as the labour matter remains pending before the Supreme Court, the respondent retains a claim of right to the property which claim of right arises from the pendency of the litigation before the Supreme Court. By extension that claim of right constitutes a full defence to a claim for vindicatory relief"

For the legal principles governing vindication the applicant cited *Stanbic Finance Zimbabwe Limited v Chivhungwa* 1999(1) ZLR 262 where MALABA J, as he then was, said the following:-

"Stanbic Finance, as the true owner of the motor vehicle, is entitled on the principles of the action *rei vindication* to recover it from any person, including the respondent, who has possession of it without its consent. The facts clearly show that it has established the two essential elements of the action *rei vindication*, namely that it is the owner of the car and that possession of it is with the respondent".

The applicant went further to cite *Oakland Nominees vs Gellria Mining & Investment Co. Limited* 1976 (1) SA 441(A) where HOLMES JA said:-

"Our law jealously protects the right of ownership and the correlative right of the owner in regard to his property, unless, of course the possessor has some enforceable right against the owner".

The above cases indeed set out the principles under which the relief of vindication can be granted.

In my earlier ruling (my judgment of 21 July 2010) wherein I had declined jurisdiction until corrected by the Supreme Court, I had explained why I thought the respondent was holding onto the assets of the applicant. At p 9 of the cyclostyled judgment I reasoned as follows:-

"I hold the view that the total cost to the employer of retaining an employee includes the employee's salary and all benefits. I would, therefore, on that basis, find it untenable, *in casu*, to remove the assets in question from the respondent's disputed

contract of employment. The employer's obligation to meet total costs of retaining an employee only vanishes when employment is finally terminated. The labour dispute now before the Labour Court is based on a contract of employment. The assets *in casu* clearly form part of the respondent's conditions of service (in particular the vehicle). In any case, the respondent is at liberty to apply to the Labour Court for the continued enjoyment of his full employment benefits until that court makes a final determination on the issue of his dismissal. It would therefore be premature to remove from him the assets that are linked to the labour dispute that he has placed before the Labour Court. To that end, I am unable to distinguish this matter from the Zimtrade case (*supra*) where MAKARAU J, as she then was, ruled that in certain circumstances "an employee can always raise the defence of a claim of right to possess the property of an employer until he or she is effectively and lawfully disentitled to the property"

We have *in casu* a situation where the respondent is saying:- "I was unlawfully dismissed and before the unlawful dismissal I was entitled to the use of the assets which are the subject matter of this application. My case is now before the labour Court where I am demanding my employment back together with all benefits attaching to my employment"

I went on, in my judgment, to say:-

"The applicant has drawn my attention to the case of *Unimark Distributors (Pvt) Ltd v ERF 94, Silvertondale (Pvt) Ltd* 1999(2) S.A. 986 @ 9966 where the following appears:-

'But there can be little doubt that one of its incidents (dominium) is the right of exclusive possession of the *res*, with the necessary corollary that the owner may claim his property wherever found from whosoever holding it. It is inherent in the nature of ownership that possession of the *res* should be normally be with the owner and it follows that no other person may withhold it from the owner unless he is vested with some rights enforceable against the owner, e.g. right of retention or a contractual right'.

I agreed with the above and then went on to quote the respondent where he says the following:-

1. Under the contract I was employed, I have first option to purchase my PAV at book value. The policy was revised downwards and therefore should not affect me but new employees.
2. The vehicle which I holding now, Namely a Mitsubishi Pajero AAV 5956 is subject to that condition".

I further quoted the following from the respondent:-

'Re-imburement for use of own car after amortizing my last vls (An Isuzu KB 320) Basis of Claim

1. Some years ago the vehicle policy was changed from a loan scheme to a company vehicle scheme because of increased maintenance costs.
2. One of the clauses was that “**employee on the current loan scheme may at anytime amortise their loan and get onto the new company car scheme**”
3. I amortised my loan in terms of that policy and procedure.
4. The policy and procedure was immediately that afternoon changed to read that you needed approval of your general manager to amortize. This AFTER 1 had amortized”.

The above averments created the impression that the respondent had a claim of right or a contractual right. The respondent argues that he had armotized his car loan in terms of the car loan scheme which was suddenly changed and he had to go for 18 months without a company car. He does not, however, tell us if he ever claimed the product of the loan. He is quite clear that the product of the alleged loan scheme is not the vehicle he is holding onto.

Furthermore, notwithstanding his arguments on a change of policy, the respondent then goes on to clearly indicate that he has no lawful right to hold onto the applicant’s property. He does this through his affidavit to police when he states:

- “1.
2.
3. I am in possession of a Mitsubishi Pajero Reg. Number AAV 5956 registered in the Name of Zimasco. I am in possession of a laptop computer belonging to Zimasco.
4. I have a cellphone line 0912286646 issued to me by Zimasco
- 5.
6. Zimasco officially allocated the vehicle to me.
7. The above goods are subject of a labour dispute, which is still in process
8. Zimasco in turn owes me a lot of money, which is subject of determination in the same labour dispute.
9. IT IS CATEGORICALLY NOT TRUE THAT THERE IS ANY THEFT INVOLVED
10. I HAVE NOT STOLEN THE VEHICLE FROM ZIMASCO ANY MORE THAN ZIMASCO STOLE THE MONEY THEY OWE ME FROM ME

11. I HAVE NO INTENTION OF KEEPING THE VEHICLE ANY LONGER THAN BEYOND THE LEGAL DETERMINATION OF THE MATTER
12. I AM MERELY KEEPING THE ITEMS IN SAFE CUSTODY AS ZIMASCO IS ALSO KEEPING IN SAFE CUSTODY WHAT I BELIEVE OWE ME
13. THIS IS A PURELY CIVIL DISPUTE MATTER SUBJECT TO DETERMINATIONBY THE JUDICIARY PROCESS OF THE REPUBLIC OF ZIMBABWE”

I do not read the above as indicating a direct and lawful claim to the assets as a result of a claim of right over them. They are being held pending payment of moneys the respondent believes he is owed by the applicant.

The respondent’s financial loss does not include the value of the vehicle. He lays no claim to the vehicle or the other assets which he admits belong to the applicant. The respondent, in my view, is not holding onto the assets as assets forming part of his conditions of service. He says he will release them once the dispute is over. He is at liberty to sue the applicant for his alleged financial loss. He is, in my view, unlawfully holding on to the applicant’s assets.

Clearly, for the respondent’s defence to be sustained, he has to establish a claim of right over the applicant’s assets. That he has failed to do. The assets, like the office which he duly vacated upon termination of employment, were placed in his hands in order for him to perform his duties as an employee of the applicant. Indeed there could have been ancillary benefits flowing from the use of those assets, such as personal use of the vehicle, but that fell away upon termination of employment – notwithstanding the challenge in the courts.

In the circumstances, I am unable to agree that the respondent has established a clear claim of right and can therefore lawfully hold onto the applicant’s assets. The applicant has proved that it owns the assets and they are in the possession of the respondent.

Accordingly the application for vindication ought to succeed.

I therefore make the following order:-

1. It is ordered that the respondent shall, within twenty-four hours of the service of this Order on him restore the following property to the applicant.
 - (a) Mitsubishi Pajero 3.0 Registration Number AAV-5956;
 - (b) Laptop HP Compaq 6720:

(c) Cellphone Samsung D880; and

2. The cost of this application shall be borne by the respondent.

Gill, Godlonton & Gerrans, applicant's legal practitioners
Chikumbirike & Associates, respondent's legal practitioners