LAFARGE CEMENT (ZIMBABWE) LIMITED
versus
MUGOVE CHATIZEMBWA

HIGH COURT OF ZIMBABWE
MATHONSI J
HARARE, 10 July 2018 and 18 July 2018

Opposed Application

Ms. Y. Kundodyiwa, for the applicant
Ms. M. Moyo, for the respondent

MATHONSI J: The applicant seeks summary judgment for the eviction of the respondent and all those claiming occupation through him from residential premises known as no. 16 West Estate, Lafarge Cement in Greendale, Harare. When the respondent received the eviction summons in HC 9669/17 in which the applicant sought to vindicate against the respondent, it being the owner of the premises which the respondent occupies without its consent and authority, the respondent entered appearance to defend and filed a plea. In that plea the defendant admitted losing his employment with the applicant but averred that he was contesting his dismissal and would only vacate the premises if he loses his labour case. He also disputed liability to pay hold over damages on the ground that he never agreed to any rental for the premises.

It is against that background that the applicant has sought summary judgment as it is of the firm view that the respondent possesses no *bona fide* defence to the eviction claim and that appearance has been entered for purposes of delay. This is because the respondent secured the premises by virtue of his employment by the applicant as a quarry superintendent which employment was terminated on 12 November 2013 following an act of misconduct the respondent admitted having committed. For that reason the respondent cannot continue in occupation of the company house not being an employee of the company.

All the material facts are really common cause. The parties indeed enjoyed an employer-employee relationship until the respondent violated the employer's code of conduct resulting in him being charged with misconduct. One of the acts of misconduct was that he had left his work

place without permission. In fact the respondent had taken a Nissan Hardbody motor vehicle belonging to the employer and driven it to a farm in Ruwa about 25km from his work location on a personal errand and was busted by his boss who later preferred charges against him. When that happened the respondent had, in vain, apologized profusely. He was still dismissed from employment.

The respondent appealed to the Labour Court against the dismissal but had his appeal thrown out by that court by judgment delivered on 24 October 2014, the court concluding that there was no merit in the appeal. The respondent then sought leave to appeal against the judgment of the Labour Court which application for leave was not made timeously and he had to seek condonation. The application for leave was not granted he having defaulted resulting in its dismissal. What the respondent is doing now is to seek a rescission of the default judgment dismissing his application for leave to appeal. So it is not like there is any pending appeal but the respondent is relying on that to contest eviction.

The issue for determination therefore is whether a former employee who was allocated company accommodation by the employer by virtue of his or her employment but has lost that employment is entitled to resist eviction by way of an *actio rei vindicatio* merely because he or she harbours an intention to contest the dismissal, a dismissal that has been upheld by the Labour Court. The point to note is that there exists no employment relationship between the parties at the present moment, it having been terminated. It is also common cause that the applicant is the exclusive owner of the premises and had only given the premises to the respondent as part of his employment benefits. Can the respondent continue enjoying the benefit of employment under those circumstances?

The principles of the *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 the owner whose property is in the possession of another without his or her consent. Roman-Dutch law has always protected the right of an owner of property to vindicate his or her property as a matter of policy even against an innocent occupier or innocent purchaser, where the property would have been sold. The occupier would only have the defence of estoppel. See *Mashave* v *Standard Bank of South Africa* Ltd 1998 (1) ZLR 436 (S) at 438 C; *Chetty* v *Naidoo* 1974 (3) SA 13 (A) at 20 A-C;

Oakland F Nominees (Pty) Ltd v *Gelria Mining and Investment Co Ltd* 1976 (1) SA 441 (A) at 452A.

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 that 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 a right to retention. See Jolly v Shannon and Anor 1998 (1) ZLR 78 (H) at 88 A-B; *Stanbic Finance Zimbabwe Ltd* v *Chivhungwa* 1999 (1) ZLR 262 (H); *Zavazava & Anor* v *Tendere* 2015 (2) ZLR 394 (H) at 398 G.

Ms *Moyo* for the respondent submitted that in an application for summary judgment the respondent is not required to prove a defence. All that the respondent is enjoined to do is to show that he has a *bona fide* defence which, if proved at the trial, would entitle him to succeed. She submitted that the respondent has managed to do so because he had shown that there is a matter pending in which he is challenging his dismissal. I agree with Ms *Kandoyowa* that there is no appeal which is pending at the moment, and that even if an appeal had been pending in the Labour Court such an appeal would not suspend the decision appealed against by virtue of the provisions of s 92 E (2). That may indeed be academic because the appeal to the Labour Court was dismissed. The respondent cannot return to the Labour Court which upheld his dismissal. As already stated, what his pending in that court is an application for rescission of judgment, not even the judgment dismissing the appeal because that cannot be rescinded it having been made in the presence of the respondent, but the judgment dismissing his application for leave to appeal.

There is therefore no appeal pending and no leave to appeal has been granted. The respondent is holding onto nothing at all as would entitle him to resist eviction. I have stated before that an employee who has lost employment has no right to hold onto the property of the former employer allocated to him or her by virtue of employment or as a condition of employment merely on the grounds that he or she is challenging the termination of the employment contract. See *Montclaire Hotel and Casino* HH 501-15. The point is also made in *William Bain & Co Holdings (Pvt) Ltd* v *Nyamukunda* HH 309-13 that a former employee cannot lawfully confiscate or hold onto a former employer's property after termination of the

employment contract because the right to hold on to the property is extinguished by the termination.

Put in another way, a former employee does not acquire a right of retention as can be used to resist a *rei vindicatio* on the basis of a challenge of a completed dismissal from employment and a forlorn hope that such dismissal may be reversed at a future uncertain date. This is particularly so in a case such as the present, where the former employee is not even in court properly challenging the dismissal. He is only seeking a rescission of a judgment which denied him leave to appeal. No right arises out of a dismissed appeal especially in a situation where even the leave to appeal against the judgment of the Labour Court has also failed. There is no determination of the contract of employment in this matter which distinguishes it from the case of *Zimtrade* v *Makaya* 2005 (1) ZLR 427 (H) where this court held that the employer could not seek to repossess its assets from an employee using the *rei vindicatio* pending the determination of the contract of employment. In this case the contract has already been determined by both the employer's disciplinary committee and the Labour Court.

It seems to me that the pronouncement of MAKARAU JP (as she then was) in *Medical Investments Ltd* v *Pedzisayi* 2010 (1) ZLR 11 (H) at 114G, 115A is apposite She said:

> "….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 vindicatio* 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."

The learned Judge was making the point that the High Court has jurisdiction to determine the claim for the recovery of the employer's property in the hands of a former employee even though the dispute was of a labour nature. She also made the crucial point that where the contract of employment has been determined the *rei vindicatio* can be used by the employer to recover the property. It is that right which the employer seeks to enforce by summary judgment in this case.

Summary judgment is an extra-ordinary and indeed drastic remedy in the sense that it negates the right of a litigant who has expressed a willingness to access the court and defend an action to do so. It is however a deliberate remedy designed to deny a *mala fide* defendant the benefit of the *audi alteram partem* rule simply because the plaintiff's claim would be

unassailable. Therefore, where the proposed defences of the defendant to the claim are clearly unarguable both in fact and in law, the drastic remedy of summary judgment is availed to the plaintiff. See *Chrisma* v *Stutchbury and Anor* 1973 (1) RLR 277 (SR) at 279.

It is settled that in order to defeat a summary judgment application the respondent must disclose facts upon which his or her defence is based with sufficient clarity and completeness so as to persuade the court that if proved at the trial, will constitute a defence to the claim. It is also settled that not every defence raised by a defendant will succeed in defeating a plaintiff's claim for summary judgment. It must be a *bona fide* defence stated with sufficient clarity and completeness to allow the court to determine whether the opposing affidavit discloses a *bona fide* defence. See *Kingston Ltd* v *L D Ineson (Pvt) Ltd* 2006 (1) ZLR 451 (S) at 458 F-G.

In my view what the respondent has raised, that he is still fighting his dismissal at the Labour Court even though that court dismissed his appeal and denied him the right to appeal to the Supreme Court against that judgment, is not a *bona fide* defence at all. If raised at the trial it will not succeed because the applicant is the undisputed owner of the property which has a vindicatory right in respect of that property. A dismissed employee has no right of retention in respect of the property where the employment contract has been terminated and there is no case pending in that regard. The applicant is entitled to summary judgment. Ms *Kundodyiwa* for the applicant abandoned the claim for hold over damages content to pursue the eviction only.

In the result, it is ordered that:

1. Summary judgment be and is hereby entered in favour of the plaintiff for the eviction of the respondent and all those claiming occupation through him from 16 West Estate, Lafarge Cement, Greendale Harare.
2. Costs of suit.

Hussein Ranchhold & Co, applicant's legal practitioners
Mabundu & Ndlovu Law Chambers, respondent's legal practitioners