PROCUREMENT REGULATORY AUTHORITY OF ZIMBABWE
versus
NYASHA CHIZU

HIGH COURT OF ZIMBABWE
CHITAPI J
HARARE, 15 October 2021 & 15 September 2022

Court Application for *Rei Vindicatio*

A Moyo, for the applicant
C Nyengedza, for the respondent

CHITAPI J: In this application, the respondent was until 23 October 2020 employed by the applicant in the position of Chief Executive Officer on a written contract of fixed duration of 6 years renewable which commenced on 1 March 2018. The 23rd October 2020 was a dark day for the respondent. The applicant terminated the employment contract aforesaid on 3 months' notice as provided for in clause 9 of the employment contract. The notice period was determined to commence on 1 November 2020.

The letter of termination of employment provided that the employee was required to return the employer's property given to the employee for use in the discharge of his employment by the applicant. The property was to be returned by 31 October 2020. The property which was listed included two motor vehicles, computers and keys. The respondent surrendered all the property as demanded and as listed save for a Mercedes Benz ML motor vehicle registration number AEX 0509. It is this ML motor vehicle which necessitated the filing of this application by the employer as applicant. The applicant seeks to vindicate the motor vehicle.

The applicant has couched the order it wants the court to give in the draft order to the application as follows:

IT IS ORDERED THAT:

1. The respondent be and is hereby ordered to surrender possession of and to return to the applicant, upon service of this order, Mercedes Benz ML registration number AEX 0509.

2. In the event of the respondent failing to comply with para 1 herein, the Sheriff of the High Court or his assistants be and are hereby authorized to take all and any such steps as may be necessary to recover the said property from the respondent or any person whomsoever is in possession hereof on the authority of the respondent and return it to the applicant.
3. The respondent shall pay the costs of this application on a legal practitioner and client scale.

The respondent justified his refusal to surrender the vehicle on the basis that the termination of his employment contract was illegal. He averred that he had filed a pending case against the applicant in case number HC 1505/21. The nature of the relief which the respondent seeks in case number 1505/21 is to pray to the court to pronounce or declare that s 12(4) of the Labour Court Act [*Chapter 28:01*] which permits for a unilateral termination of a contract of employment upon giving notice is unconstitutional. The respondent then argued that the applicant did not have proper standing to bring this application because case number HC 1505/21 being pending ought to be disposed of first. The respondent prayed for the dismissal of the application with costs on the basis of *lis pendens*. The respondent averred that case number HC 1505/21 dealt with the cancellation of the employment contract as much as *in casu*.

In respect to the challenge to s 12(4)(c) of the Labour Court Act, the respondent whilst confessing the existence of the written contract, however submitted that the clause in the contract which allowed for termination on notice could not be given effect to as to do so would be unlawful. The issue in my view is whether or not even if the respondent's argument was sound, he could lawfully keep the vehicle belonging to the applicant and which vehicle the applicant seeks to vindicate. The respondent averred that he has also prayed for consequential relief setting aside the termination of his employment.

The respondent did not deny that property belonging to the applicant as employer had been given to the respondent for use in the discharge by the respondent of his employment contractual mandates. The vehicle in issue formed part of that property. The respondent did not dispute that he returned the rest of the property as demanded by the employer and neither did he explain why the vehicle had to be excepted. The employer did not except the vehicle from delivery.

The applicant averred that case number HC 1505/21 could not be held to be *lis pendens* because it did not involve the same parties. The application had additional parties namely, the Minister of Public Service, Labour and Social Welfare and the Attorney General. The applicant also averred that the application HC 1505/21 was not based on the same cause of action because whereas the applicant's case was based upon the common law remedy of *rei vindicatio* whilst case number HC 1505/21 was grounded upon an alleged violation of s 68 of the Constitution as read with s 85 of the same Constitution.

The applicant is correct in its contention that this application is not subject to *lis pendens*. In the first instance *lis pendens* even if it is established is not an absolute bar to the court to proceed with the current or second *lis*. It is in the discretion of the court to either stay the second *lis* pending the conclusion of the first *lis*. The respected authors Herbstein and Van Winsen in their book, *The Civil Practice of the Superior Courts in South Africa*, 3rd edition at p 269-270 state.

> "……it is clear that the principle of *lis pendens* or *lis atibi pendens* is not an absolute bar. It is discretionary upon the court to decide whether it must be allowed to proceed. The question then is, is it just equitable to allow the present case to be heard or allow the objection raised by respondent to bar the hearing."

See also *Chizura* v *Chweshe* 2003 (2) ZLR 64; *Hwatirinda* v *Tavarava* HMA 27/21; *Matapata* v *Chitamba & 2 Ors* HH 161/20.

As regards the requirements for the plea of *lis pendens* to be established, they are the same as for the plea of *res judicata*. HLATSHWAYO J (as then he was) stated as follows of the plea of *lis pendens* in the case *Diocesan Trustees, Diocese of Harare* v *Church of the Province of Central Africa* 2009 (2) ZLR 57 (4) at p 71.

> "The plea in abatement that case are pending proceedings between the same parties (*lis alibi pendens*) is raised by a party that is able to establish the following pre-requisites: (a) that the litigation is pending; (b) the other proceedings are between the same parties or their ……; (c) the pending proceedings are based on the same cause of action; and (d) the pending proceedings are in respect of the same subject matter. However, even if a party satisfies all the requisites, the court still has discretion to order or refuse a stay of execution on the grounds of *lis pendens*; and in the exercise of that discretion it will have regard to the equities and the balance of convenience in the matter. See *Mhungu* v *Mtendi* 1986 (2) ZLR 171 (S); *Boldwin* v *Baldwin* 1967 RLR 289 (CD); *Chizura* v *Chiweshe* 2003 (2) ZLR 64 (H)."

In my view the plea of *lis pendens* must fail. The respondent has failed to establish that the cause of action in case number HC 1505/21 is the same as in this application. It is common cause that in HC 1505/21 the respondent seeks a declaration of constitutional invalidity of a

provision of a statute being s 12(40)(c) of the Labour Act. Until the declaration is made, the provision impugned remains effectual and must be given effect to. The challenge brought in HC 1505/21 does not constitute the same cause of action as the remedy *rei vindicatio* on which this application is based. *Lis pendens* has therefore not been established. Again baring on the side of caution, even is *lis pendens* had been established I would still have exercised discretion to have the application proceed because the equities of the matter and the balance of convenience are in favour of the matter being proceeded with. I should in this request note that a proper exercise of discretion must find support upon the consideration of all relevant facts.

In casu, the respondent concluded a contract of employment with the applicant which he does not dispute. He only woke up to the alleged invalidity of the notice clause after he had been dismissed on notice as signed for by him. He did not explain why he became wiser after having been discharged and not before. Secondly, s 12(4)(c) of the Labour Act remains valid until struck out. The application must be determined on the basis that the respondent was lawfully dismissed in accordance with the law. He cannot claim rights or a remedy based upon an expectation that his application in case number HC 1505/21 will succeed. Besides the respondent did not seek interim relief regarding the fate of the vehicle pending determination of HC 1505/21 and has no counter application filed *in casu.* It would be inequitable and inconvenient to stay this application which is based upon a different relief from the one sought in case number HC 1505/21. The nature of the relief sought in HC 1505/21 does not invalidate s 12(4)(c) of the Labour Act which remains in full force until struck out. For those reasons the discretion not to stay the application would still have been exercised.

I turn to decide whether the applicant has established a case for the relief of *rei vindicatio*. The Supreme Court per ZIYAMBA JA in the case of *Joram Nyahora* v *CFI Holdings (Pvt) Ltd* 2014 (2) ZLR 607 (S) at 613 stated:

> "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 upon the principle that an owner cannot be deprived of his property against his will. He is entitled to recover it from anyone 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".

See *Chetty* v *Naidoo* 1974 (3) SA 13 (A) at 20; *Jolly* v *A Shannon & Anor* 1998 (1) ZLR 78 (HC) at 88; *Stanbic Finance Zimbabwe Ltd* v *Chivhungwa* 199 (1) ZLR 262 (H) at 265-266; *Zimbabwe Commercial Farmers Union* v *Tapiwa Nyamakura* HH 208/16; *Tendai Savanhu* v *Hwange Colliery Company* SC 8/2015. From the decided authorities, it is clear that all that the applicant does is to prove that he is the owner and that the property to be vindicated is in the possession of the respondent. Where the right of the respondent to possession is conceded at any stage prior to the proceedings, the applicant bears the onus to prove a valid termination of that right. *Matador Buildings (Pvt) Ltd* v *Harman* 1971 (2) SA 21 (C); *Schnehage* v *Bezuidenhout* 1977 (1) SA 362 (0). The respondent has failed to establish any valid right at law to continue to hold the vehicle against the owner. The termination of employment remains valid until set aside in case number HC 1505/21. In the meantime the respondent has no right to hold on to the vehicle or has failed to establish such right. Vindication must be granted.

The applicant has sought costs of the legal practitioner and client scale. Such scale of costs should be justified because the scale is a departure from the ordinary court scale. The applicant averred that is has incurred necessary costs in instituting this application against an intransigent respondent who took the law into his own hands. I am inclined to grant costs on this scale. All the objective facts point to a deliberate refusal by the respondent to return the vehicle for no other purpose than selfishness. The respondent surrendered every other property except the motor vehicle. He appreciated that he could not keep the property after termination of employment. He mounted a spurious defence that the case was *lis pendens*. The defence which he raised has no substance as a defence at law. It was a defence in *terrorum* because it is trite that a party cannot rely upon a challenge to a statute which has not been repealed or struck down to avoid a lawful obligation. Costs are in the discretion of the court which discretion must be judiciously exercised. Costs on the higher scale are justified and will be granted. The opposition filed by the respondent is so *devoid* of merit that it can only have been contrived and was *mala fide*.

In the result the applicant has proved its case and the following order is made:

IT IS ORDERED THAT:

1. The respondent be and is hereby ordered to surrender possession of and to return to the applicant, upon service of this Order, Mercedes Benz ML registration number AEX 0509.

2. In the event of the respondent failing to comply with para 1 herein, the Sheriff be and is hereby authorized to take all and any such steps as may be necessary to recover the said property from the respondent or any person whomsoever is in possession thereof on the authority of the respondent and return it to the applicant.
3. The respondent shall pay the costs of this application on a legal practitioner and client scale.

Kantor & immerman, applicant's legal practitioners
Hogwe Nyengedza, respondent's legal practitioners