TELONE (PRIVATE) LIMITED
versus
EDWIN MATINYARARE

HIGH COURT OF ZIMBABWE
MAKONI J
HARARE, 2 February 2012 and 8 May 2013

Opposed Matter

G. Chinguma, for the applicant
T.J. Gumbo, for the respondent

MAKONI J: The respondent was employed by the applicant as Head Administration: As part of his employment benefits he was allocated a motor vehicle for his duties namely a Toyota Hilux registration number ABD 8617 (the vehicle). On 3 June 2011, the applicant terminated the respondent's contract of employment following disciplinary proceedings in terms of the National Code of Conduct. When the respondent was on suspension he was allowed to use the vehicle. The respondent challenged the dismissal by noting an appeal to the Labour Relations Office. The matter is still pending. The applicant then instituted the present proceedings seeking to recover the vehicle from the respondent.

The basis for seeking such relief is that the respondent does not have any lawful basis for holding on to the applicant's vehicle. His entitlement to the vehicle, like any other benefits, ceased as a consequence of the termination of his employment. It was also averred that by holding on to the vehicle, the respondent is contravening s 57 of the Road Traffic Act [*Cap 13:11*].

The application is opposed mainly of three grounds. The first ground is that this court has no jurisdiction to entertain an application of this nature. The matter is pending before the Labour Court and the applicant ought to have followed that route. The second ground is that the noting of an appeal suspends the decision appealed against. The third ground is that he is entitled to continue to use the vehicle as the terms of his suspension allowed him to use the vehicle pending the determination of the matter.

JURISDICTION

It was submitted on the behalf of the applicant that the present claim is based under the common law principle of *rei vindicatio*. There is no provision, in terms of the Labour

Court Act [*Cap 28:01*] which allows it to deal with such an issue. It was further submitted that the decisions in *Zimtrade* v *Marlord Makaya* 2005(1) ZLR 427(H) *Medical Investments Limited* v *Rumbidzayi Pedzisayi* HH 26/10 and *DHL* v *Madzikanda* HH 51/10 were patently wrong and that this court was at large to depart from them.

It was contended that if there was a labour dispute between the parties, but the relief being sought cannot be granted by the Labour Court, as in the case of *rei vindication,* the High Court exercises jurisdiction. This would constitute an answer to the position adopted by MAKARAU JP in the three cases referred to above. The unintended consequence of the position in these three cases is that it leaves a dispute without an adjudicating authority.

It was further contended that when an employee is dismissed, the employer-employee relationship ceases to exist. The relationship can only be salvaged by a lawful order re-instating the employee. Where there is no such relationship then the rules of Labour Law do not apply. The parties will then have not be guided by the operation of common law which is properly administered by courts of inherent jurisdiction such as this court.

The respondent contends that this court has no jurisdiction to entertain this matter and relies on the authority of the three cases referred to by the applicant.

It is common cause that the respondent acquired or possessed the vehicle by virtue of an employment contract. The contract was terminated. The respondent is challenging the termination of the contract.

The issue for me, would be whether the issue of vindication of the vehicle can be determined without directly dealing with the rights of the parties on the issue of termination of the contract of employment. The answer, in my view, is to be found in DHL *supra* at p 3 of cyclostyled judgment where MAKARAU JP, (as she then was) in reference to her other judgment in Zimtrade *supra* stated:-

> "In that matter, which was unopposed, I declined jurisdiction. My reasoning in that matter was firstly that the Labour Court has exclusive jurisdiction in matters relating to suspensions from employment and termination of employment. Secondly, I reasoned that the possession of the employer's property by an employee in terms of the contract of employment is so interdependently linked to the contract that one cannot decide on one without deciding on the other. In the result, because the Labour Court has exclusive jurisdiction over the one, it follows that it also has exclusive jurisdiction over the one. The conditions of service of an employee are simply the terms upon which that employee is employed and to try and separate the contract from its terms upon which that employee is employed and to try and separate the contract from its terms appears to me legally untenable and in any event highly untenable".

I associate myself fully with the above sentiments. The relief that the applicant seeks in this matter is premised on the final outcome of the labour dispute. That dispute has not been exhaustively and decisively determined by the appropriate court. MAKARAU JP (as she then was) in DHL *supra* dealt with the issue why the Labour Court is the appropriate forum. On the same p 3 she said:-

> "Where, however, a dispute can either found cause of action at common law or in terms of the Act, a case of apparent concurrent jurisdiction between this court and the Labour Court appears to arise. I say appears to arise because the apparent conflict can easily be resolved by paying regard to the overall intention of the legislature in creating the Labour Act. In my view, in such a case, the Labour Court's jurisdiction, being special, must prevail. It would make a mockery of the clear intention of the legislature to create a special court is the jurisdiction of such a court could be defeated by the mere framing of disputes into common law cause of action were the Act has made specific provisions for the same. In my view, if the dispute is provided for in the Act, the Labour Court has exclusive jurisdiction even if the dispute is also resolvable at common law".

I will therefore find that this court has no jurisdiction to grant the relief that the applicant seeks.

I will adopt the procedure adopted by MAKARAU JP (as she then was) by proceeding to determine the matter on the merits on the assumption that I might have erred.

The facts of this matter are almost on all fours with those in DHL *supra* where MAKARAU JP (as she then was) made a finding that the status of the respondent in that matter had not been finally determined as it was pending before the Labour Court and that the respondent has successfully discharged the onus on him to prove the right to possess the vehicle pending the determination of the appeal that was pending before the Labour Court.

The respondent, *in casu*, has discharged the onus on him to establish the defence of claim of right. In effect, the applicant has not advanced any arguments on that issue.

If I had jurisdiction in this matter I would have found for the respondent.

The last issue is whether the noting of an appeal to the Labour Court suspends the decision appealed against in view of the provision of s 92E of the Act. It was contended for the applicant that an appeal in terms of s 92E does not suspend the decision appealed against. Any action taken after dismissal is valid even if the dismissal is later overturned. The employer is at liberty to hire another employee. That is why there is s 89(2)(c) which allows a court ordering re-instatement to specify an alternative for damages in lieu of re-instatement.

That an appeal filed in terms of s 92E does not suspend the decision appealed against is settled. The employee is regarded as dismissed pending the determination of the appeal

MAKARAU JP (as she then was) in DHL *supra* at p 5 of cyclostyled judgment dealt with the issue in this way.

> "It however appears to me that the provisions of s 92E of the Act have no effect on the claim of right that the respondent is raising at common law. Where the law regards the respondent as dismissed he has never accepted that position and is challenging his purported dismissal before the Labour Court. For as long as his challenge is alive and not fully determined, his claim of right remains alive with it. It is only when his challenge is invalidated at law that he loses the basis for his claim of right. The claim that the respondent has is not in my view dependent upon whether the law regards him at an employee or not rather it is dependent upon whether or not the dispute between the parties has been definitively resolved.

In *casu* the dispute between the parties has not been exhaustively and definitively determined. The respondent's defence of claim of right is still alive. The applicant can only approach this court after the appeal has been determined. Assuming I had jurisdiction, I would have dismissed the application on the basis that it is premature.

In view of the above findings I will make the following order:

1. The application is dismissed.
2. The applicant to pay the respondent's costs

Dube Manikai & Hwacha, applicant's legal practitioners
Atherstone & Cook, respondent's legal practitioners