ANDREW KASERERA
and
JOHN SIBANDA
and
SYDNEY MANDIDI
and
MECK NCUBE
and
MAJORA LEMBACHURU
versus
RIOZIM (PRIVATE) LIMITED

HIGH COURT OF ZIMBABWE
MANGOTA J
HARARE, 4 April 2014 and 9 April, 2014

Urgent chamber application

S. Nyagura, for the applicants
R. Moyo, for the respondent

MANGOTA J: Applicants who are employees of the respondent were allocated motor vehicles for official and personal use. The allocation was in terms of their contracts of employment as read with the respondent's motor vehicle policy a copy of which the applicants attached to their application. The policy was marked Annexure 'A'. The annexure contains a provision for the applicants' ownership of the motor vehicles after they have remained with the vehicles for a period of four (4) years.

The applicants alleged that the four (4) year cycle at the end of which period ownership of the vehicles was due to them elapsed in January 2013. That stated matter, they claimed, caused the respondent's human resources manager, one Moses Mawire, to transfer ownership of the motor vehicles into their respective names.

The acquisition of ownership of the motor vehicles by the applicants constitutes a material dispute of fact with which the High Court remains seized. The applicants' contention

is that they acquired ownership of the motor vehicles not only lawfully but with the blessing of the respondent. They, in support of their claim, attached to the application Annexure B1-B5. The annexures are to the effect that the vehicles which are the subject of the parties' dispute in another case had extended their economic life cycle in terms of the respondent's motor vehicle policy and had, therefore, been handed over to the applicants as their respective personal vehicles.

The respondent, on the other hand, counter - argued against the applicants' claim and stated that the applicants acquired the motor vehicles unlawfully and without its blessing. It stated that the applicants capitalised on the chaos which occurred at their place of work in, or around, January, 2013 and proceeded to bring pressure to bear on Moses Mawire and the latter's colleagues and, in the process, took transfer of the respondent's motor vehicles. It referred the court to what it termed a vindicatory action which it said it filed with the court under case number HC 10472/13. The action, it said, is aimed at recovering its motor vehicles from the applicants as well as having ownership of the same transferred to it. It argued that, in arm-twisting Mr. Mawire and others to transfer ownership of the motor vehicles to them in the manner which they allegedly did, the applicants committed an act of misconduct for which they had to be brought before a disciplinary authority which the respondent established in terms of its code of conduct.

The applicants, on their part, stated that the contemplated disciplinary hearings were, or are, intended to victimise them in a very serious manner as well as to take away from them the motor vehicles the ownership of which, they claim, they lawfully acquired. They prayed the court to grant them what they termed a prohibitory interdict which would compel the respondent to stop the disciplinary hearings pending the finalisation of the case which the respondent filed with the court under case number HC 10472/13. They alleged that the outcome of the disciplinary hearings was pre-determined and the respondent would not, therefore, buy their defence. They stated that the respondent was not interested in anything other than getting rid of them. They said they would be exposed to the respondent's ruthlessness if the court did not make an order compelling the respondent to stay the disciplinary hearings pending the determination of the vindicatory action which it filed with the court.

The respondent raised four preliminary matters in its opposition to the application. The matters in question were, or are, that;

(i) the relief which the applicants are seeking before this court is an incompetent one

(ii) this court does not have jurisdiction to entertain as well as determine the application

(iii) the application is not urgent – and

(iv) the applicants will not suffer irreparable harm.

It is pertinent for the court to examine the abovementioned four *in limine* matters, each in turn, with a view to determining whether or not it supports the claim of the applicants or that of the respondent. The net effect of the examination will, in the court's view, assist in the disposal of the case in one way or the other. The court therefore proceeds to examine the four preliminary matters as follows:-

(a) Incompetent Relief

Counsel for the respondent spoke with a certain degree of eloquency in his effort to impress upon the court on the need on its part to remain alive to the distinction which exists between a vindicatory action and a disciplinary hearing. He said whilst the action was based on the principles of common law, the hearings which the respondent instituted against the applicants were based on the provisions of the Labour Amendment Act number 17 of 2002. He stated that the vindicatory action which is referred to in case number HC 10472/13 is a common law action which the respondent, as owner of the vehicles, instituted with a view to recovering from the applicants possession and ownership of the vehicles. He developed his argument and stated, further, that the disciplinary hearings which the respondent instituted against the applicants were an internal process the result of which was aimed at disciplining the applicants for their misconduct. He stated in a very persuasive manner that it was incompetent for the applicants to invite the court to interdict the internal labour process on the basis of a vindication action.

The court mentions in passing that it was thoroughly impressed by Mr. Moyo's line of reasoning which, taken at face value, would almost have moved the court to dismiss the application and rule in the respondent's favour without any further ado. Mr. Moyo showed the court that he had done a lot of research work on the matter and he had no difficulty in arguing his client's case along the lines which he had developed. He, to his credit, enriched the court with a number of case law authorities which he submitted into court during the hearing of the application. The court remains extremely grateful to him in this mentioned regard. So much, therefore, for the legal practitioner's excellent work which he did for, and on behalf of, his client.

The misconduct which prompted the respondent to prefer changes against the applicants is said to have occurred in, or around, January 2013. It occurred, the respondent said, during a disturbance which allegedly took place at the applicants' place of work. The respondent did not advance any reason which caused it to delay the disciplinary hearings for a stretch of fourteen (14) months running. The misconduct is alleged to have taken place in January, 2013 and the notices which relate to the hearings were issued to the applicants only on 28 March, 2014.

The respondent's employer-employee code of conduct in terms of which the charges were preferred against the applicants was not availed to the court. The court does not, therefore, know its contents particularly the procedures which the respondent is enjoined to follow when it prefers charges against its employees. What the court does know, though, is that most employer-employee codes of conduct do contain some set standard guidelines and time lines within which charges should be preffered against an employee, or employees, who is, or are, alleged to have involved himself or herself, or themselves into some act(s) of misconduct. The guidelines which are, more often than not, followed are that an investigation into the conduct is instituted as the initial step and some recommendations are made as a result of which charges are, or are not, preferred against the employees(s). *In casu*, the respondent appears not to have followed the outlined procedure when it proceeded to prefer charges against the applicants. Because the court remains in the dark on the mentioned point, the court accords to the respondent the benefit of doubt on that same matter. It does so as it may very well be the position that the respondent's code of conduct under which the charges against the applicants were preferred does not have in it the procedure which is, by and large, accepted as a standard way of dealing with disciplinary matters in most employer-employee codes of conduct.

The applicants, as has already been stated, alleged that the hearings were aimed at nothing but getting rid of them from the respondent's employment. They alleged that the hearings were interconnected to their acquisition and ownership of the motor vehicles. They, in the mentioned regard, urged the court not to take a piece-meal examination of the matter on the point at hand. They, in short, implored the court to take a wholistic approach to the same.

A reading of the contents of the notices which the respondent dished out to the applicants on 28 March, 2014, does, in the court's view, support the applicants' claim.

The wording of each one of the notices is identical and it, in part, reads:

"The basis of the above allegation is as follows:

(a) You transferred an NP 300 Nissan Hardbody irregularly during the period of unlawful occupancy of the mine in early 2013. This was in contravention of the Chief Executive Officer's communique of 21 December, 2012.

(b) Ownership of the vehicle should have reverted to the company since all decisions made during the said occupation were ruled unlawful and of no force or effect by the High Court.

(c) Notwithstanding management's several communications and proferred financial assistance in the form of cash – *in lieu* of leave /salary advancement to meet the costs of reversing the vehicle ownership, you have not obliged up to now.

Therefore you are advised to appear before the Disciplinary Authority…." (my own emphasis)

The foregoing shows in a clear and lucid manner that for the fourteen (14) months which it did not act to, as it were, discipline the applicants the respondent was busy compelling the applicants, in some way or other, to hand-over the motor vehicles to it as well as to transfer ownership of the same from the applicants' respective names into its own name. The respondent, it is evident, made *several communications* with the applicants to whom it advanced money as a way of enabling the latter to *reverse the vehicle ownership*. It was only when the applicants refused to give in to the respondent's very harsh demands which were apparently veiled in some conciliatory tones that the respondent realised that it was not making any headway and it, therefore, made up its mind to:

(i) institute legal action under case number HC 10472/13 – and

(ii) charge the applicants with an act of misconduct.

The fact that the respondent filed the vindicatory action with the court on 5 December, 2013 and not before that date explains its inaction for fourteen consecutive months. The court, in the premise, remains of the view that the contemplated disciplinary action has nothing to do with giving the applicants any fair hearing. It is, if anything, instituted *mala fides* and with a certain degree of vindictiveness on the part of the respondent who appears to have been thoroughly frustrated by the applicants' refusal to hand over possession and ownership of the vehicles to it. The respondent translated what it sought from the applicants through some internal process into an apparent labour dispute which it knows this court is precluded from hearing, let alone making a determination upon. The net effect of the charges

which the respondent preferred against the applicants is one and the same thing namely transfer of possession and ownership of the motor vehicles. (my own emphasis). The applicants stated as much and the respondent confirmed the same in the vindicatory action which it instituted against the applicants.

Paragraph (a) of the notices which the respondent issued to the applicants is pertinent. The paragraph makes reference to the manner in which the applicants proceeded to acquire possession and ownership of the vehicles. The respondent said that possession and ownership were done unlawfully. The applicants' assertion on that point is to the contrary. The court remains of the firm view that the vindicatory action which the respondent instituted will resolve that dispute.

The respondent confused issues when it stated, as it did, that the purported charges against the applicants were, or are, separate and distinct from the vindication action which it instituted. The charges have nothing to do with disciplining the applicants. They, in the court's firm view, have everything which relates to the possession and ownership of the motor vehicles. This, therefore, is not a matter which falls to be decided in terms of the respondent's code of conduct. It is, in short, not a matter for disciplinary, but vindicatory, action which this court is competent to deal with. The respondent's argument on this point does not, therefore, hold.

(b) Jurisdiction

This preliminary matter is easily discounted on the basis of the reasoning and findings which the court made in the first matter *in limine*. This entire case, it is observed, is hinged on the vindicatory, and not disciplinary, action which the respondent appears to want the court to accept. The court is satisfied that it has the requisite jurisdiction to hear as well as to make a determination which binds the parties to observe and respect the court's decision on the same. It is the court's view that the respondent brought into the equation the far-fetched issue of its purported desire to discipline the applicants as a way of confusing issues which are in themselves clear. The court is satisfied that it has never been, nor is it now, the intention of the respondent to prefer against the applicants' charges which are devoid of malice on its part. Any charges which are preferred against the applicants *mala fides* as appears to be the respondent's desire *in casu* constitute an unfair labour practice and therefore unlawful. Section 7 (1) (b) of the Labour Act; [*Cap* 28:01] is pertinent on the point. Neither the Labour Court nor this court, let alone the law supports the respondent's action of

translating what is a purely civil matter between the parties into a purported labour dispute solely as a way of punishing the applicants for their perceived stubbornness.

If the respondent did have a genuine, as opposed to a vindictive, grievance against the applicants, it would not have sat on its intended action for the length of the observed period of time without doing anything about the matter which it appears to have held so dearly to it.

The law and the courts guard jealously their inherent right as well as duty to interfere with employers who take the law into their own hands under the guise that they want to discipline members of their workforce when, in actual fact, their aim and object are totally different from what they say they want to achieve in a lawful manner. Once it is discovered, as it was in the present case, that the employer's purported conduct is unlawful and can best be resolved through lawful means, the court would be failing in its duty if it did not and does not put an effective stop to that conduct.

The respondent did well to institute the action which it did under case number HC 10472/13. The court which is seized with the matter will, in the fullness of time, determine the unlawfulness, or otherwise, of the applicants' conduct. The court is, accordingly, satisfied that it is clothed with the jurisdiction not only to hear the present application but also to determine its merits and demerits as well as coming up with a clearly defined position on the same. The respondent's argument on this second preliminary matter does not, therefore, hold.

(c) Urgency

It was the respondent's submission on this preliminary matter that the present application was not urgent. The respondent stated that the applicants should have foreseen that disciplinary proceedings would be instituted. This intended process, it said, became apparent to the applicants as far back as early January, 2013 when the respondent brought the application in the matter which the court determined under HC770/13 wherein the court ruled in its favour. It stated that, if the applicants needed to act to interdict any disciplinary proceedings, they should have done so in early January, 2013 or at the latest in December 2013 when the respondent instituted the vindication action.

The applicants, on their part, argued that they acted when they saw the charges which had been preferred against them and not before that time. The court agrees with the position which the applicants took of the matter on this point. They could not act on nothing. They were not joined to the application which the respondent filed with the court under case number HC770/13. The respondent did not inform the court that it drew the applicants'

attention to the outcome of its mentioned application. It, on its part, did not prefer any charges against them at about the time which it says they should have foreseen that disciplinary proceedings would come their way. All it did was to engage them - verbally or otherwise – to return ownership of the motor vehicles to it. Nor would the applicants have been persuaded to think that the vindication action which the respondent instituted in December, 2013 would lead to some misconduct charges being preferred against them three months after the action was filed with the court. Everything appeared normal and lawful to them until 28 March, 2014 when they saw that the respondent's conduct was going outside the law and had, therefore, to be arrested.

The disciplinary hearing notices which the respondent addressed to the applicants are dated 28 March, 2014. The hearings were set down for 3 and 4 April, 2014. The applicants did not indicate the date(s) on which the notices were served upon them. They, however, prepared the papers which relate to this application on 1 April, 2014 and filed the same with the court on 2 April, 2014. They suffered a delay of some three (3) or four (4) days before their application was with the court. They cannot, in view of the foregoing, be said not to have treated their case with the urgency which it deserved. The court would have viewed their action as having been an unreasonable one if they acted before the charges were preferred against them as the respondent argued. That would have been so as they would have acted out of an imagined, as opposed to a real, threat. The charges which the respondent served upon them were and are a real threat which calls upon the court to entertain and make a determination of the same.

(d) Irreparable harm

The applicants stated that they would be exposed to the respondent's ruthlessness if their application was not granted. They stated further that the respondent's desire was to kick them off their employment.

There is, in the court's view, no harm which is worse than that of depriving a person of his means of livelihood. That harm is difficult, if not impossible, to repair. The observed *mala fides* with which the respondent preferred the charges against the applicants was indeed aimed at nothing else other than ensuring that the latter's rights of protection of the law as well as their employment prospects were under serious threat.

The respondent argued, erroneously though, that if the applicants remained of the view that the disciplinary hearings were not fairly conducted, they had the right of appeal beyond the work - place to the Labour Court as well as to the Supreme Court.

It, in the mentioned regard, sought to persuade the court to subscribe to the view that the applicants did, or do, have alternative remedies which they could take advantage of where the respondent unfairly dealt with then. That the respondent was going to deal with them unfairly is taken as given. Once that has occurred, it is not certain if the applicants would have had the means with which to pursue the avenues which the respondent said were, or are, open to them. For a start, they would most probably have lost their employment. They would, in that case, have had to grapple with placing food on the table for their respective families in addition to marshalling the requisite financial resources to prosecute their appeal. The net effect is that the avenues which are seemingly open to them would have been closed against them for eternity. Justice does not come cheaply to those who are in search of it as the respondent would have the court believe. The respondent's argument on this point is, once again, discounted as not being a valid one.

The applicants prayed that the court grants them an interdict. They want the respondent to be compelled to stop the disciplinary hearings pending finalisation of the vindication action which is before this court.

The requirements for an interdict were aptly stated in *Nyika Investments (Pvt) Ltd* v *ZIMASCO Holdings (Pvt) Ltd* & *ORS*, 2001 (1) ZLR 212 wherein CHATIKOBO J (as he then was) remarked:

> "Interdicts are based on rights which, in terms of the substantive law, are sufficient to find a cause of action. The right need not be a clear right whose existence is proved on a preponderance of probability. Where a clear right is shown to exist, then the applicant for an interim interdict need not show that he will suffer irreparable harm if the interdict is not granted. He merely has to show that an injury has been committed or that there is a reasonable apprehension that an injury will be committed ...."

The court associates itself with the learned Judge's abovementioned remarks on this matter. The applicants' apprehension of what would befall them if the disciplinary proceedings are not halted is very real. They, on their part, established the urgency of their application which they treated with the urgency which it deserved. They established their case, on a balance of probabilities, to the satisfaction of the court. The application is, in the premises, granted as prayed.

Matsikidze and Mucheche Commercial Law Chambers, applicants' legal practitioners
Gill, Godlonton & Gerrans, respondent's legal practitioners