

CITY OF MUTARE
versus
OBERT LENOS MUZAWAZI

HIGH COURT OF ZIMBABWE
MATANDA-MOYO & CHIRAWU-MUGOMBA JJ
HARARE, 2 April & 30 May 2019

Civil appeal

Ms *F. Chinovadzimba*, for the appellant
P. Seda, for the respondent

MATANDA-MOYO J: This is an appeal against the decision of the magistrate sitting at Mutare which dismissed appellant's application for *rei vindicatio*. Appellant noted an appeal against the judgment on the following grounds;

1. That the learned Magistrate grossly erred in holding that the Labour Officer's draft ruling subject to confirmation by the Labour Court was a judgment binding on the parties.
2. That the learned Magistrate grossly erred at law in totally failing to appreciate and apply the law relating to *rei vindicatio* to the facts of the application.
3. That the learned Magistrate grossly erred in concluding and finding that the parties relationship was a "marriage" which accorded respondents rights thereby totally misleading himself on both facts and law and
4. That the learned Magistrate grossly erred and seriously misdirected himself at law and an facts by making reference to annexures which preceded the Labour Officer's draft ruling thereby exceeding his jurisdiction law.

Appellant prayed that the appeal be allowed and that the judgment of the court *a quo* be set aside and be substituted with the following;

"The application be and is hereby granted with costs."

The brief facts are that the respondent was employed by the appellant as a Town Clerk from 22 June 2007 to 26 January 2016, when respondent tendered his resignation by mutual

consent. The parties further agreed that the appellant was going to calculate and pay severance remuneration and other ancillary payments commensurate with the post of Town Clerk.

The respondent brought a claim against the appellant before a Labour Officer when the appellant delayed in paying severance package and other benefits. The Labour Officer found in favour of the respondent. The Labour Officer also ordered the appellant to sell to the respondent the immovable property namely number 2 Shangai Drive Murambi at 50% of the current market value.

The Labour Officer has filed his ruling for confirmation before the Labour Court in terms of s 93 (5a) of the Labour Act [*Chapter 18:07*]. The application for confirmation was heard by the Labour Court on 27th July 2017. The appellant requested that the matter be referred to the Constitutional Court. The matter was so referred. Whilst the matter is pending before the Constitutional Court and the Labour Court the appellant filed an application before the Magistrate Court for the eviction of the respondent from number 2 Shangai Drive, Murambi and payment of \$1200.00 per month as holding over damages. The application was dismissed by the Magistrate Court on the basis that the house in question was awarded to the respondent by the Labour Officer. The Magistrate found that the ruling by the Labour Officer is extant and that the respondent had a *virilis defensio*. The magistrate thus dismissed the claim.

Rei vindicatio is a remedy available to an owner of a res against any person impeding the owner's possession of the thing. If an owner is deprived of possession of its property without legal cause, the owner is entitled to recover the property from the person in possession of it. As put in *Chetty v Naidoo* 1974 (3) SA 13A

“It is inherent in the nature of ownership that possession of the res should normally be with the owner, and it follows that no other person may withhold it from the owner unless he is vested with some right enforceable against the owner (e.g. a right of retention on a contractual right) The owner, in instituting a *rei vindicatio*, need, therefore, do no more than allege and prove that he is the owner and that the defendant is holding the *res* – the onus being on the defendant to allege and establish any right to continue to hold against the owner ... *CCF Jeena v Minister of Lands*, 1995 (2) SA 380 (AD) at pp 382E, 383) ...”

The appellant proved that it is the owner of number 2 Shangai Drive Murambi, and indeed showed that the respondent was in possession of the property. Once the appellant so proved, the onus shifted to the respondent to show a legally recognised right of retention of immovable property.

The respondent claimed a right to retain possession of the immovable property on the basis of an order of the Labour Officer who found that the respondent is entitled to purchase the immovable property. The order is awaiting confirmation by the Labour Court.

The immovable property thus forms part of the terminal benefits owed. The respondent by the appellant by virtue of the Labour Officer's ruling.

There are four major defences to a claim of *rei vindicatio* namely:

1. That the applicant is not the owner of the property.
2. That property no longer exists.
3. That the respondent's possession on physical control of the property is not unlawful or
4. That the respondent is no longer in physical control of the property.

(1), (2) and (4) above defences are not applicable herein as it is common cause that the appellant is the owner of the property in question. The property clearly is in existence and the respondent is in physical control of the property. These three factors are common cause. The respondent only relies on (3) above i.e that his possession or physical control of the property is not unlawful. It is in accordance with the Labour Officer's ruling which has not been set aside by any competent court. As long as that order remains extant the respondent could not be said to be in unlawful possession of the *res*.

The court a *quo*'s decision that the respondent managed to establish a right in respect of the property sought to be vindicated cannot be faulted. See *Begfin v Ntane SALR (2) 1989*. The court a *quo*'s decision is unassailable. The appeal must therefore fail.

In the result we order as follows:

The appeal fails and be and is hereby dismissed with costs.

CHIRAWU-MUGOMBA J agrees

Messrs Bere Brothers, appellant's legal practitioners
Sawyer and Mkushi, respondent's legal practitioners