

DHL INTERNATIONAL (PVT) LTD  
versus  
CLIVE MADZIKANDA

HIGH COURT OF ZIMBABWE  
MAKARAU JP  
Harare 14 January and 17 March 2010.

OPPOSED APPLICATION

*Mr K E Kadzere* for applicant.  
Respondent in person.

MAKARAU JP: The respondent was employed by the applicant as its Finance Manager up to July 2009 when allegations of misconduct were leveled against him. A disciplinary hearing was convened to determine the validity of the allegations and it found him guilty as charged. He appealed to the applicant's Area Managing Director against the dismissal without success. He then appealed to the Labour Court arguing that his dismissal was racially motivated and in any event, the penalty meted against him was unduly harsh. The appeal to the Labour Court was pending at the time of the hearing of the application.

After the respondent had lost his appeal to the Area Managing Director, the applicant demanded the return of certain of its assets that were in the possession of the respondent, being assets that the applicant had put into his possession in fulfillment of his conditions of service. The respondent did not hand over to the applicant a motor vehicle, an Isuzu truck bearing the registration number AAG 0764. This prompted the applicant to file this application, seeking an order compelling the respondent to deliver the vehicle.

The application was opposed.

In opposing the application, the respondent denied that he was properly dismissed from employment and submitted that he has bright prospects of success on appeal. It was his view that the justice of the matter demands that he retains the motor vehicle pending the determination of his appeal by the Labour Court.

In his heads of argument, the respondent argued in limine that this court has no jurisdiction to determine the matter, exclusive jurisdiction in the matter having been reposed in

the Labour Court by the provisions of section 89 of the Labour Act,[Chapter 28:01]’ (“the Act”).

In my view, two issues arise. Firstly, I have to determine whether this court has jurisdiction over the dispute between the parties. If this court does enjoy jurisdiction in the matter, I must proceed to determine whether or not pending determination of the respondent’s appeal in the Labour Court, the applicant can retrieve its motor vehicle from the respondent using the *rei vindicatio*.

The issue of when the jurisdiction of this court is ousted by the provisions of the Act has been before this court in a number of cases before. (See *National Railways of Zimbabwe v Zimbabwe Railway Artisans Union and Others* SC8/05 and *Tuso v City of Harare* 2004 (1) ZLR 1 (HC); In my view, I think the position is now settled that a dispute falls to be determined exclusively by the Labour Court if such arises from a cause of action that has been specifically provided for in the Act and for which a remedy is also provided for in the Act.

Section 89(1) (a) of the Act provides that:

“(1) the Labour Court shall exercise the following functions-

- (a) hearing and determining applications and appeals in terms of this Act or any other enactment; and
- (b) .....; and
- (c) .....; and
- (d) .....; and
- (e) .....

(The other paragraphs are inapplicable in this matter).

Section 89(6) then proceeds to provide that:

(6) No court, other than the Labour Court, shall have jurisdiction in the first instance to hear and determine any application, appeal or matter referred to in subsection (1).

The literal and grammatical meaning of the two sections read together have been held in the cases that I have referred to above to mean that if the dispute is provided for in the Act both in terms of cause of action and remedy or remedies, then the Labour Court has exclusive jurisdiction over the dispute.

In *casu*, it has been argued on behalf of the applicant that the applicant has brought a common law vindicatory claim against the respondent in which it seeks to recover its motor vehicle from the respondent. In this regard, the applicant is relying on the common law cause of action that allows an owner to vindicate its property from whosoever is in unlawful

possession of same and therefore the dispute falls outside the purview of the Labour Court which cannot determine common law causes of action.

As a general statement, it is correct that that the Labour Court has no jurisdiction to entertain claims that are brought at common law. It can only determine applications and appeals among others that are brought in terms of the Act. Where, however, a dispute can either found a cause of action at common law and 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 be easily resolved by paying regard to the overall intention of the Legislature in creating the Labour Court. 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 where 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.

From the number of similar disputes being filed with this court one would say that there appears to be a general misconception amongst employers that one can easily avoid the jurisdiction of the Labour Court by seeking to recover property in the possession of an employee without first exhaustively dealing with the termination of the employment of that employee. I have had occasion to consider a similar question in *Zimtrade v Makaya* 2005 (1) ZLR 427 (H). 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 form 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 other. 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 appears to me legally untenable and in any event, highly undesirable.

In the arguments that have been made on behalf of the applicant, I find nothing that persuades me to move me from the views I expressed in the *Zimtrade* case.

On the basis of the above, I would hold that this court has no jurisdiction in the above matter.

Assuming that I have erred in holding that this court has no jurisdiction in this matter, I still would have dismissed the application at common law.

Vindication is a remedy that is available to an owner against the world at large. By reason of his or her rights of ownership, an owner is competent at law to demand possession of his or her property from anyone who cannot invoke a right against him or her to keep the property. For one to succeed in such an action, one must allege and prove that they are the owners of the property in question and that the respondent or defendant is in possession of the property. (See *Van der Merwe and Another v Taylor N.O. and Others* 2008 (1) SA 1 CC).

Whilst it is not necessary for the owner to allege that the possession of the respondent/defendant is unlawful for them to establish a valid cause of action, such considerations come into play when the court is determining the application. The right of the owner to possess his property is not absolute and may be subject to some other right that the possessor may have against the owner. (See *Chetty v Naidoo* 1974 (3) SA 13 [AD]; *Hefer v Van Greuning* 1979 (4) SA 952 (A) and *Van der Merwe and Another v Taylor N.O. and Others* (supra)).

*Mr Kadzere* for the applicant submitted, and correctly so in my view, that the onus rests with the respondent to prove the right to possess the motor vehicle against the owner.

It appears to me that in *casu*, the right of the applicant to possess the motor vehicle is subject to the rights that the respondent has to the vehicle in terms of his employment with the applicant. Whilst the applicant has deposed to the fact that the respondent has been dismissed from employment, that dismissal is subject to appeal. It is still in dispute and so are the entitlements of the respondent under the contract of employment. In contrast, I may at this stage mention that on the same day that I heard argument in this matter, I also heard argument in the matter of *Medical Investments Limited v Rumbidzayi Pedzisai* HH 26/2010 wherein I found that the applicant in that case was entitled to vindicate its vehicle from the respondent, a former employee, as the employer-employee relationship between the parties had terminated on account of the resignation of the respondent. In that matter, the status of the former employee as such was not in doubt. In *casu*, it appears to me that the status of the respondent has not been finally determined as it is pending the appeal before the Labour Court.

As such, the facts of this matter are distinguishable from that of the *Medical Investments Limited* case.

On the basis of the foregoing, even if this court had jurisdiction to determine this dispute at common law, I would have found that the respondent has successfully discharged the onus on him to prove the right to possess the motor vehicle against the applicant, pending determination of the appeal that is pending in the Labour Court.

Finally, *Mr Kadzere* has further submitted that in view of the provisions of section 92E of the Act, the respondent stands dismissed from employment as the noting of an appeal to the Labour Court does not suspend the decision appealed against. Again, *Mr Kadzere* is correct. Sections 92E of the Act provides:

- (1) An appeal in terms of this Act may address the merits of the determination or decision appealed against.
- (2) An appeal in terms of subsection (1) shall not have the effect of suspending the determination or decision appealed against.
- (3) Pending the determination of an appeal the Labour Court may make such interim determination in the matter as the justice of the case requires.

In my view, the amendment to the law in 2005 to provide that appeals to the Labour Court would not suspend the decision appealed against was clearly meant to vary the common law position that was prevailing prior to the amendment. That for the purposes of the Act the employee is regarded as dismissed pending the determination of the appeal appears to me to be beyond dispute.

It however appears to me that the provisions of section 92E of the Act have no effect on the claim of right that the respondent is raising at common law. While 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 as an employee or not. Rather, it is dependant upon whether or not the dispute between the parties has been definitively resolved. In this instance, the dispute between the parties is pending before the Labour Court and resultantly, the claim of right remains alive.

On the basis of the above, assuming that this court had jurisdiction in the matter, I would have dismissed the application on the basis that it is premature. The respondent has a claim of right to the motor vehicle that can only be determined upon after the appeal before the

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Labour Court has been finalized. To approach this court before the hearing of the appeal is incompetent as the relationship upon which the applicant allowed the respondent possession of the vehicle has not been definitively determined upon.

It is however my finding, as detailed above, that this court has no jurisdiction in this matter.

In the result, I make the following order:

The application is dismissed.

*Gill Godlonton & Gerrans*, applicant's legal practitioners.