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Making away with the Employer's Property: What are the Employer's remedies?

Introduction

Oftentimes when the employer and employee separate disputes relating to the return of assets allocated to the employee during the course of his employment for the execution of his duties arise. These assets include but are not limited to computers, motor vehicles and in some cases accommodation. In this paper we look at the remedies available to an employer who seeks to recover his assets from his former employee or even an employee on suspension. Some employers even resort to filing complaints of theft in a desperate bid to recover their assets but this is unlawful. Our courts have in numerous cases concluded that an employer can recover his assets from an employee who keeps possession of the employer's assets against the employer's consent.

An employer is entitled to approach a court of law and apply for the recovery of its assets. This is called vindication. *Actio rei vindicatio* is an action brought by an owner of property to recover it from any person who retains possession of it without his consent. It derives from the principle that an owner cannot be deprived of his property without his consent. As it was put in *Chetty v Naidoo 1974 (3) SA 13*:

"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 or 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... (cf. *Jeena v Minister of Lands, 1955 (2) SA 380 (AD)* at pp 382E, 383)..."

Nature of *rei vindicatio*

The relief of *rei vindicatio* is available to the owner of property, who is at law, entitled to be in physical possession of his property, the res. An owner of property is at liberty to repossess his property at any time that he desires, because it is the nature of ownership that possession of the property should repose in its owner at all times. See *Graham v Ridley 1931 TPD 476*, where the principle was set out as follows:

"...It is inherent in the nature of ownership that possession 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."

In *Stanbic Finance Zimbabwe LTD v Chivhungwa 1999 (1) ZLR 262 (HC)*, the court applying the principle behind the *rei*

vindicatio to the case of a motor vehicle owned by the plaintiff and leased to a buyer under a suspensive agreement of sale, referred to *Jolly v A Shannon & Anor 1998 (1) ZLR 78 (HC)* where it was said

"The principle on which the *actio rei vindicatio* is based is that an owner cannot be deprived of his property against his will and that he is entitled to recover it from any person who retains possession of it without his consent. The plaintiff in such a case must allege and prove that he is the owner of a clearly identifiable movable or immovable asset and that the defendant was in possession of it at the commencement of the action. Once ownership has been proved its continuation is presumed. The onus is on the defendant to prove a right of retention: *Chetty v Naidoo 1974 (3) SA 13 (A)* at 20A-C; *Makumborenga v Marini S-130-95 p 2*. It follows that the action is based on the factual situation that prevailed at the time of the commencement of the legal proceedings."

In *Alspite Private Limited v Westerhoff 2009 (2) ZLR 226 (H) @ p 236 E-F*, the court stated that:

"The *rei vindicatio* is an action that is founded in property law. It is aimed at protection ownership. It is based on the principle that an owner shall not be deprived of his property without his consent. So exclusive is the right of an owner to possess his or her property, that, at law he or she is entitled to recover it wherever found and from whomsoever is holding it, without alleging anything further than that he or she is the owner and that the defendant is in possession of the property. Thus it is an action in rem, enforceable against the world at large. This is settled law in our jurisdiction, and hardly requires authority. See *Siyanda v The Church of Christ 1994(1) ZLR 74(S)*, *Musanihi v Mt Darwin Rushinga Cooperative Union 1997 (1) ZLR 120(S)*, *Mashave v Standard Chartered Bank of South Africa Ltd 1998 (1) ZLR 436 (S)*...". *Surface Investments (Pvt) Ltd v Maurice Chinyani HH295/14*,
In *FBC Bank Limited v Energy Deshe, HH285/11*, the court remarked:

"... employers deserve the protection of the law from employees who take the law into their own hands as demonstrated by the respondent in casu."

Requirements to be established in a *rei vindicatio*

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 on the principle that an owner cannot be deprived of his property against his will. He is entitled to recover it from any one 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. In the present

case, the respondent raised a claim of right.

Onus on the possessor

The onus rests with the employee or the party who has possession against the will of the owner to prove a right to possess the asset. Where such right is derived from an option to purchase company assets, the employee has to exercise the option, before an employee can take possession of the property. An offer has to be made and accepted before a contract of sale is concluded.

Defences to an action for vindication

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. The onus rests with the employee or the party who has possession against the will of the owner to prove a right to possess the asset. An option to purchase company assets, has to be exercised, before an employee can take possession of the property. An offer has to be made and accepted before a contract of sale is concluded. In *JORAM NYAHORA v CFI HOLDINGS PRIVATE LIMITED, SC 81/14*, the Supreme Court had this to say:

“It may be mentioned here that in most cases the option granted by an employer to purchase a used company car is a privilege accorded to its employees perhaps in the hope that this will induce loyal service as well as a culture of caring for the company property or some other reason beneficial to the employer/company. Therefore, unless the contract specifically states so, a court ought to be careful not to read a legal right into a policy matter which is for the discretion of the employer. In my judgment the question of a right to purchase could only arise after an offer had been made to, and accepted by, the employee to purchase the vehicle and not before.

As matters now stand, no offer has been made to the appellant by the respondent employer. The terms of the purchase have not been set. The appellant has no sale agreement on which to found his alleged right to purchase. He is not entitled to hold onto the vehicle pending agreement.

As it was observed by Justice Makarau in *Medical Investments Limited v Pedzisayi HH 26/2010*:

‘I am unaware of any law that entitles a prospective purchaser to have possession of the merx against the wishes of the seller, prior to delivery of the merx in terms of the sale agreement’

NDOU J in Dhege v Dell Medical Centre HB 50/04, remarked as follows,

‘In the circumstances it cannot be argued that the respondent was obliged to sell the company car to applicant. The court cannot compel a party to exercise its discretion in a particular fashion. The court can compel a part to do what is mandatory in terms of an existing agreement. The right to purchase the company car could only be exercised after an offer had been made to the employee and not before. The option to offer for

sale, cars used by employees was a privilege and not a right.’

Similar sentiments were echoed in *TENDAI SAVANHU v HWANGE COLLIERY COMPANY, SC/8/15*.

In any event, even if for argument’s sake there existed a custom or practice that retiring chairpersons were allowed to purchase their vehicles on terms set by the respondent, it was never alleged, let alone established, that the vehicle had been offered to the appellant for purchase and if so on what terms. In the absence of an offer by the respondent which was accepted by the appellant no contract came into existence. Accordingly, the finding by the court a quo that no contractual or other enforceable right to retain possession of the vehicle was established by the appellant was unassailable.

What is the effect of pending litigation?

In *Zimtrade v Maylord Makaya HH 52/05*, Justice Makarau declined to grant a *rei vindicatio* where an employee had been dismissed and the matter was still pending at the Labour Court. She remarked as follows;

“It is in my further view unacceptable splitting of hairs to separate the determination of the validity of suspension from employment, on one hand, from the determination of whether or not that suspension affects the benefits enjoyed by the employee, on the other hand. The two are interdependent and are both governed by the existing employment relationship obtaining between the two parties. The argument that the employer can vindicate his property at any time does not impress me as the employee can always raise the defence of claim of right to possess the property until he or she is effectively and lawfully disentitled to the property.”

This case was followed in *Telecel Zimbabwe (Pvt) Ltd v Naquib Omar HH 116 /11*. In *Zimasco (Pvt) Ltd v Farai Maynard Marikano HH 235/11*, the respondent’s contract of employment was terminated and he retained the applicant’s vehicle. The applicant filed an application for *rei vindicatio*. *MTSHIYA J* declined to exercise his jurisdiction over the matter on the basis that the matter was a labour dispute. It was held that assets which form part of conditions of service may be retained until the contract of employment is conclusively terminated. As long as the contract of employment remains extant, the employee’s rights remain vested in the employee. The Supreme Court on appeal set aside the order of the High Court and remitted the matter to the High court for determination on the merits before the same judge. The Supreme Court did not expressly deal with the question whether the High court has jurisdiction to entertain a *rei vindication* application where the former employee was dismissed and an appeal is pending in the Labour Court. In *DHL INTERNATIONAL (PVT) LTD v CLIVE MADZIKANDA 2010 ZLR 201(H)*, the employee was found guilty after a disciplinary hearing and dismissed. 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, for the return of company assets. After the employee had lost his appeal to the Area Managing Director, the company demanded the return of certain of its assets that were in the possession of the employee, being assets that the company had put into his possession in fulfillment of his conditions of service. The employee did not hand over to the company its motor vehicle in question. This prompted the company to file an application, seeking an order compelling the respondent to deliver the vehicle. The application was unsuccessful. The court declined jurisdiction, holding that the Labour Court had exclusive jurisdiction in labour matters. The court also found that the respondent employee had 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.

In contrast Justice Charewa in *PREMIER SERVICE MEDICAL AID SOCIETY v HENRY MANDISHONA HH/219/17* held, correctly in our view, that whether the termination of the employment relationship, the suspension from employment or dismissal is unlawful, or whether there is an order of reinstatement which the employer clearly has no intention to comply with or whether an appeal has been noted against such termination, suspension or dismissal, seems to me to be irrelevant. An employee stands suspended or dismissed as long as the employer is not willing to reinstate him or her. And by that reason, no right of retention of the property of the employer accrues to the employee as the contract remains terminated. In *Zimbabwe Educational Scientific Social and Cultural Workers Union v Claud Kaharo HH 222/11* it was held that

"...A rei vindicatio action, which is rooted in common law, is certainly not one of those where the Labour Court enjoys jurisdiction ...unless its jurisdiction has been specifically and expressly ousted by the legislature, this court has a concomitant duty to jealously guard against the erosion of its inherent jurisdiction. I am firmly convinced that this court enjoys its power to hear an action for vindication, because, as I said, this power falls outside the jurisdiction of the Labour Court".

It is trite that the noting of an appeal does not suspend the decision being appealed against. In *Zimbabwe Broadcasting Holdings v Gomo 2010 (1) ZLR 8*, an employee who had noted an appeal against her dismissal to the Labour Court. The applicant had in the interim applied for return of its property. The court held that an appeal to the Labour Court did not give the employee the right to retain the property she was in possession of in terms of a contract of employment that had been terminated unless she had a recognisable defence to the claim by the applicant. The court remarked as follows, "Our law, as it currently stands, is to the effect that once an

employee has been suspended or dismissed from employment, any benefits extended to such employee from that relationship cease. In *Chisipite Schools Trust (Pvt) Ltd v Clark, GUBBAY CJ* stated: "Pending the removal of the suspension, the respondent was not entitled to the continued enjoyment of the benefits comprising the free occupation of the Headmistress's house and the continued use of the motor vehicle. A Labour Relations Officer cannot order the respondent to surrender these particular benefits. Consequently, the applicant being unable to resort to self-help approached the High Court for relief, I consider it was justified in doing so".

In the matter of the matter of *Medical Investments Limited v Rumbidzayi Pedzisai HH 26/2010* the court found that the employer 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.

Conclusion

Actio rei vindicatio is an action brought by an owner of property to recover it from any person who retains possession of it without his consent. It derives from the principle that an owner cannot be deprived of his property without his consent. For one to succeed in such an action, one must allege and prove that he is the owner of the property in question and that the person in possession of the property has possession against the will or consent of the owner. (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 is unlawful, such factors are considered when the court is determining the application of the return of assets. 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, 2008(1) SA 1(CC)*). The onus rests with the employee or the party who has possession against the will of the owner to prove a right to possess the asset. Where such right is derived from an option to purchase company assets, the employee has to exercise the option, before an employee can take possession of the property. An offer has to be made and accepted before a contract of sale is concluded. Employers are advised to carefully craft their motor vehicle policies and ensure that they observe such policies.

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The taxpayer's obligation to prevent the taxman from putting the largest possible shovel into his stores

A taxpayer cannot be stopped from entering into a bona fide transaction which, when carried out, has the effect of avoiding or reducing tax liability, provided that there is no provision in the law designed to prevent that avoidance or reduction of tax. This principle is clearly brought out in *Ayrshire Pullman Motor Services and DM Ritchie v IRC* at 763-4:

"It is trite law that His Majesty's subjects are free, if they can, to make their own arrangements so that their cases may fall outside the scope of the taxing acts. They incur no legal penalties, and strictly speaking, no moral censure, if, having considered the lines drawn by the legislature for the imposing of taxes, they make it their business to walk outside them.

"No man in this country is under the smallest obligation, moral or other, so as to arrange his legal relations to his business or to his property as to enable the Inland Revenue to put the largest possible shovel into his stores. The Inland Revenue is not slow – and quite rightly – to take every advantage which is open to it under the taxing statutes for purposes of depleting the taxpayer's pocket. And the taxpayer is, in like manner, entitled to be astute to prevent, as far as he honestly can, the depletion of his means by the revenue."

There is an important distinction between tax evasion and tax avoidance. Tax evasion refers to the illegal activities deliberately undertaken by a taxpayer to free himself from a tax burden. Tax avoidance, by contrast, usually denotes a situation in which the taxpayer has arranged his affairs in a perfectly legal manner, with the result he has either reduced his income or has no income on which tax is payable.

Section 98 of the Income Tax Act [Chapter 23:06] targets transactions, operations or schemes which have the effect of avoiding, reducing or postponing the payment of tax. For the section to be invoked, such avoidance must have been in the Commissioner's opinion, the sole or one of the main purposes of the scheme. If these requirements are fulfilled, the Commissioner must show that the scheme must be tainted by "abnormality". Section 98 may therefore be viewed as a combination of three tests, the first two being the avoidance effect and purpose respectively and the third, abnormality test. Tax authorities, naturally, tend to invoke tax avoidance provisions only where a tax avoidance effect has already been perceived. The cases accordingly turn on the questions of purpose or abnormality. *SIR v Geustyn, Forsyth and Jourbert* (1971) 33 SATC 113 concerned a company with unlimited liability formed to take over the business of consulting engineers

formerly carried on in a partnership by its three directors, who were also shareholders in the company. In acquiring the business of the partnership, the company undertook to employ the three former partners at a certain salary and to pay the partnership an amount for their goodwill equal to three years' profits of the partnership. There were no service contracts and there was no guarantee for payment of the goodwill. The latter was credited to interest-earning loan accounts of the former partners.

It was found that it was not the sole or main purpose of the conversion from a partnership to a company to avoid tax. The onus of proof that the sole or main purpose was not tax avoidance, however, rests upon the taxpayer himself.

CIR v Louw (1983) 45 SATC 113 dealt with the incorporation of a professional partnership of consulting engineers. One of the results of the incorporation was that the shareholders' income by way of salaries and dividends was considerably less than their income as partners; another result was that, after a time, the shareholders borrowed the surplus funds of the company by way of interest-free loans.

The Court viewed the incorporation of the partnership and the subsequent granting of loans as independent transactions and, while finding that the incorporation was safe from the anti-avoidance provisions, it held that the loans were vulnerable to the application of the provision. The incorporation of a partnership was found not to be abnormal, but the granting of loans to shareholders instead of their receiving salaries as employees was considered to be abnormal.

The Commissioner is empowered, as he thinks fit, to assess either as if the scheme had not taken place or in such a manner as he considers appropriate in order to prevent or diminish the avoidance.

The other provisions in the Income Tax Act whose effect serve as a counter to tax avoidance are section 23 (1), 24 and Schedule 2. Section 23 (1) provides that, where a person carrying on a trade in Zimbabwe either (a) purchase property (movable or immovable) at a price in excess of the fair market price or (b) sells at less than the fair market price, the Commissioner may determine a fair market price for the purposes of that person's assessment.

Section 24 deals with transaction where there is a foreign element of management, control or capital, and the Commissioner considers that the condition between the connected parties differ from those which would arise between parties at arm's length. The Commissioner is then empowered to determine, on an arm's length basis, the taxable income of any party carrying on business in Zimbabwe.

In Schedule 2, provisos to paragraph 4 and 12 deal with the situation where a taxpayer has disposed of non-farm trading stock and farm trading stock respectively, in various ways, such as donation, and the Commissioner is of the opinion that tax

avoidance was the sole or main purpose of such disposal. The Commissioner is empowered to determine the amount to which the stock would have realized had it been sold in the ordinary course of trade and to include such amount in the taxpayer's gross income.

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JOKE OF THE MONTH

A physician, an engineer, and an attorney were discussing who among them belonged to the oldest of the three professions represented. The physician said, "Remember that, on the sixth day, God took a rib from Adam and fashioned Eve, making him the first surgeon. Therefore, medicine is the oldest profession." The engineer replied, "But, before that, God created the heavens and earth from chaos and confusion, and thus he was the first engineer. Therefore, engineering is an older profession than medicine." Then, the lawyer spoke up, "Yes, but who do you think created all of the chaos and confusion?"

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