

ZHIQIANG GAO
versus
HUANG BAOQUANG
and
HUANG BAOMING
and
DALIAN TIANCHENG MINERAL RESOURCES (Pvt) Ltd

Opposed Application

HIGH COURT OF ZIMBABWE
MHURI J
HARARE; 19 February 2025 & 12 March 2025

Mr T Rusinahama & Ms P Maromo for the applicant
Mr F Nyakatsapa for the respondents

MHURI J: This is an application for a mandatory interdict. Applicant seeks an order in the following terms:

1. The application for compelling Order be and is hereby granted.
2. The Respondents be and are hereby ordered to release the Deawoo Excavator at Number 32 Courtney, Ballantyne Park, Borrowdale.
3. The Respondents are prohibited from denying Applicant access to Courtney, Ballantyne Park, Borrowdale Number 32 for purposes of collection of the Deawoo Excavator.
4. The Respondents to pay costs on higher scale.

The facts giving rise to the present application are common cause. Applicant was resident at number 32 Courtney Road, Ballantyne Park, Borrowdale together with First Respondent. Sometime in 2022, Applicant was evicted by Respondents in terms of a Court Order under case number HC3272/20. Upon eviction Applicant left behind his excavator. Respondents then requested the removal of the excavator from the premises. The request was made to the owner of which at that time Applicant was not the owner but it belonged to Applicant's friend who had relocated to outside the Country. There was a bill of taxed costs against Applicant then Applicant offered the excavator to settle the bill. Respondents rejected

the offer indicating their preference for cash payment. Respondents filed an application for taxed and storage costs at the Magistrates Court and an order against the Applicant was granted for taxed costs. Applicant then made an application for rescission of that judgment and the matter is still awaiting determination. Meanwhile, applicant has settled the taxed costs and is awaiting the Court to determine his liability for storage costs. Applicant then disposed of the excavator through selling it to a third party, wherefore upon collection of the excavator, Respondents refused to release it and demanded payment of storage costs and taxed costs. It is against these facts that the present application has been lodged.

Applicant's Submissions

Applicant submitted that he is the bona fide owner of the excavator. He conceded that the excavator is kept as a lien for taxed costs. It was Applicant's contention that the excavator could be held as debt of taxed costs and not storage costs, which debt he has acknowledged and cleared. He submitted that he is unwilling to pay storage costs because Respondents have no right to claim retention of excavator over the storage costs and if ever the rights exist, the amounts to be charged must be determined by the Court. Applicant argued that the claim for lien is mischievous as the Magistrates Court issued a default judgement in favor of Respondents. Further, there was an attachment over the storage costs which was to be done on other properties excluding the excavator. To substantiate the argument that Respondents have no right of retention over the excavator reliance was made to the case of *BAK Storage (Pvt) Ltd v Greensberg Investments (Pvt)Ltd* HH837/15. It was Applicant's submission that Respondents have no mandate to keep the excavator hence they cannot claim storage costs. Further, there is no contractual relationship between Applicant and Respondents and no Court Order directing payment of storage costs. Applicant has no duty to settle the storage costs. Applicant argued that there is no contractual relationship between them warranting the exercise of lien over the excavator for storage costs owed. Applicant prayed for costs on a higher scale, arguing that the present application is an inconvenience to Applicant who has earlier communicated with Respondent about the excavator.

Respondents Submissions

It was Respondent's submission that the version of events as articulated by Applicant is incorrect. However, they conceded that there were taxed costs awarded to Respondents, which costs were to be paid by Applicant in full. Respondents argued that a letter was sent to Applicant requesting him to collect his excavator failure of which storage costs will accrue.

Applicant's silence and failure to collect the excavator meant that he agreed to have the excavator kept safely by Respondents and having the storage costs charged on him.

Further, Respondents contended that there were not charging storage costs at the same time exercising a lien. It was in May 2024 that Respondents started exercising lien and stopped charging storage costs after being advised that Applicant intended to collect the excavator. It was Respondents' submission that they are holding onto the excavator as a lien over storage costs as there is a contractual relationship between the parties. Respondents prayed for the dismissal of the application.

The Law and Disposition

The requirements that must be established in an application for a final interdict have been set out in a long line of cases in this jurisdiction. In the case of *Econet Wireless Holdings & Ors v Min of Finance & Others* 2001 (1) ZLR 373 (S) at 374 B this Court had occasion to succinctly set them out. The court held that:

“What the appellants in this case sought was a final interdict. In order to succeed in obtaining such an interdict they had to establish:

- (a) a clear right;
 - (b) an injury actually committed or reasonably apprehended; and
 - (c) the absence of similar protection by any other ordinary remedy.
- See *Setlogelo v Setlogelo* 914 AD 221 at 227 ; *Sanachem (Pty) Ltd v Farmers Agri-care (Pty) Ltd & Ors* 1995 (2) SA 781 (A) at 789 B-C; *Charuma Blasting & Earthmoving Svcs (Pvt) Ltd v Njanjai & Ors* 2000 (1) ZLR 85 (S) at 89 D” *Blue Rangers Estates (Pvt) Ltd v Muduviri & Another* 2009 (1) ZLR 368 (S)”

From these cases, it is settled that the requirements for a final interdict can be summarised as follows:

1. a clear right which must be established on a balance of probabilities.
2. irreparable injury actually committed or reasonably apprehended
3. the absence of a similar protection by any other remedy.

It is common cause that Applicant is the bona fide owner of the excavator, Respondent has not disputed that. In the circumstances, Applicant holds rights and interests over the excavator. It is the Court's duty to protect owners of property as articulated by the Supreme Court in the case of *Chido Erica Matewa (In her capacity as Executrix Dative of the Estate Late Judith Matewa) v City Of Harare* SC 61/23 at pg8-9

“Ownership is the mother of all real rights. Having real rights over the property, the respondent acquired exclusive rights over the property. Under property law, the registration of a real right protects its holder against the public at large. In other words, once a real right has been registered, it becomes enforceable against the whole world.”

In the case of Oakland Nominees (Pty) Ltd v Gelria Mining & Investment Co. (Pty) Ltd 1976
(1) SA 441 (A) at pg 452 the court noted:

“Our law jealously protects the right of ownership and the correlative right of the owner in regard to his property, unless, of course, the possessor has some enforceable right against the owner.”

From the foregoing Applicant is the bonafide owner who possesses rights of possession of the excavator.

With regard to the second requirement for an interdict Applicant has satisfied same. This is so because Applicant has already engaged a buyer for the excavator and has unequivocally communicated to the Respondents that the proceeds will be used to clear his (Applicant's) debt. Respondents submitted that they are holding over the excavator as lien over storage costs. I find the retention of the excavator unreasonable and unjustified considering that there is a matter before the Magistrates Court wherein it has to determine whether Applicant owes storage costs. In the circumstances, the holding of the excavator by Respondents creates irreparable financial harm to the Applicant and defeats the cause of justice.

The last requirement for an application of an interdict is the absence of a similar protection by any other remedy. It is my finding that Applicant has failed to establish that he has no other legal remedy. My understanding is that Applicant can explore other legal routes such as making an application for *rei vindicatio* or await the currently pending Magistrates Court determination (on whether he is liable to pay storage costs). In the present Application, Applicant prays for an Order prohibiting Respondents from withholding the excavator and compelling Respondents to release same. The effect of this prayer and the possible *rei vindicatio* Application are more or less the same. Hence, I will grant the Applicant's prayer.

Finally, it is pertinent to address the Respondents submission that they are holding over the excavator as lien for storage costs. It is therefore pertinent to address the circumstances wherein lien applies.

In City of Masvingo v Zimbabwe Urban Council Workers Union & 2 Ors HMA48-17 at pg9 Mafusire J noted;

“A lien is basically a right of retention, or *jus retentionis*. It is some form of self-help that arises by operation of the law. It accrues to the possessor of someone's property over which he has incurred expenses. The possessor is entitled to retain, or, in the case of an immovable property,

to occupy, the property until he has been duly compensated for his expenses. The lien is a form of security. There are basically two types of liens; improvement or salvage liens, and debtor-creditor liens. Improvement or salvage liens accrue to a possessor or occupier who has improved someone's property or expended money's worth on it. These types of liens confer real rights. Debtor-creditor liens are conferred on a person who has done work on another's property or rendered a service in pursuance of a contract..."

In the circumstances, a right of lien would have been exercised if parties had a debtor/creditor relationship. It is undisputed that Applicant owed taxed costs and cleared same, what is of contention is whether Applicant owes storage costs and must pay for them? If the answer is in the positive, then Respondents have a right to retain the excavator. In casu, it is trite that in the Magistrate Court under Case Number 2902/23 Applicant was ordered to pay storage costs and that judgement was rescinded and is still at the PTC stage. I will therefore not interfere with a pending Court determination; hence I find that the issue will be dealt with by the Magistrates Court. In my considered view, Respondents have no right to withhold the excavator as lien for storage costs as they are currently holding unto it with the hope that the Court finds in their favour

Resultantly, the application is granted in the following terms:

1. The application for compelling Order be and is hereby granted.
2. The Respondents be and are hereby ordered to release the Deawoo Excavator at Number 32 Courtney, Ballantyne Park, Borrowdale.
3. The Respondents are prohibited from denying Applicant access to Courtney, Ballantyne Park, and Borrowdale Number 32 for purposes of collection of the Deawoo Excavator.
4. The Respondents to pay costs of suit on a higher scale.

Rusinahama Rabvukwa Attorneys, applicant's legal practitioners
Motonhori Attorneys, Respondent's legal practitioners

MHURI J:.....

