

COLLET MOYO
and
WISIKESI ROBERT
and
BARNABAS MOZHENDI
and
PRECIOUS NYIKA
and
EDSON DENGU
and
PUEPUETE KALUZI
and
WESTON MUSONDA
and
NOLEEN GEZANI
and
TAPIWA KUMUTSANA
and
BETTY MANDAVA
and
LOVEMORE MAFIROWANDA
and
FIAS MATARIRANO
and
ONESMUS BHEBHE
and
ELLEN MAPHOSA
and
MAZURUSE MAHLASELA
and
AARON DZIMIRI
and
DANIEL CHINODYA
and
AARON PAUNDI
and
DENNIS CHADENGA
and
GILBERT GUMBA
and
DENNIS PARADZA
and
VINCENT MOYO
And

ABEL MUDADISI

versus

SMM HOLDINGS (Private) Ltd (Under Reconstruction) t/a SMMH PROPERTIES

HIGH COURT OF ZIMBABWE

WAMAMBO J & ZISENGWE J

MASVINGO, 23 September 2021 & 28 January 2022

Civil Appeal

Ms Maposa and Mr Ruvengo for the Appellants

Ms N. Chisenga for the Respondent

ZISENGWE J: This is an appeal mainly against that part of the judgment handed down by the Magistrates Court sitting at Masvingo ordering the eviction of the appellants from houses belonging to the respondent. The appellants took occupation of the said houses (hereinafter referred to as “the company houses”) on account of their employment with the SMM Holdings.

In the court below the respondent instituted two separate but related claims against the appellants. In the first claim it sought the eviction of the appellants from the company houses on the basis of the termination of their employment and the concomitant loss of their right to remain in occupation of the same. In the second claim it sought to recover what it claimed were arrear rentals from each of the appellants stemming from their continued occupation of the company houses post the termination of their employment. This latter claim was dismissed by the court *a quo* on the basis that same was incompetent given that there was no existing lease agreement between the parties at that point in time to entitle the respondents to seek the recovery of arrear rentals. The court found that the Respondent should have more appropriately claimed for holding over damages. The court however found that the respondent was entitled to evict the appellants from the company houses as the latter had no legal basis to cling onto the same. More pertinently the court *a quo* rejected the appellants’ contention that they had a lien over the company houses on account of their unpaid salaries, wages and other benefits.

There was no cross appeal by the respondents against the decision to dismiss the arrear rentals claim hence this judgment (save for the issue of costs) is dedicated entirely to the question of the eviction of the appellants from the company houses.

As alluded to earlier, the respondent's claim for the eviction of the appellants in the proceedings *a quo* was predicated on the expiration of the lease agreements between it on the one hand and the appellants or the other which in turn was based on the termination of each appellant's employment with the respondent.

In the proceedings below the appellants did not necessarily present a common defence to the eviction claim. Whereas some of the appellants were content in resisting the eviction on the basis that they currently had an existing lease agreement with the appellants whose terms they had not breached thus depriving respondents the right to evict them, others specifically put question of the lien (which institutes the backbone of this present appeal) squarely in issue. It was averred in the latter regard by the bulk of the appellants that since they were each owed substantial sums of money (running into thousands of United States dollars) in unpaid salaries and other benefits, they were legally entitled to remain in occupation of the company houses as a form of retention until the respondent extinguished its indebtedness to them.

During the ensuing trial two witnesses testified for the respondent namely Cathrine Nyambiya and Master Liwonde its Senior Human Officer and Finance Assistant officer respectively. On the other hand, six of the Appellants gave evidence in their respective personal capacities as well as in a representative capacity for the rest.

From the evidence as a whole the following facts (relevant for current purposes) emerged as common cause. The appellants as aforementioned are all former employees of the Respondent company, the former is a company under a reconstruction order issued by the Minister of Justice, Legal and Parliamentary Affairs in terms of the Reconstruction of State – Indebted Insolvent Companies Act, [Chapter 24:27] (“the Reconstruction Act”)

During the currency of their employment they occupied various positions within the respondent company. The reasons for the termination of employment of the appellants are diverse ranging from resignation to dismissal due to prolonged absenteeism (referred by the witnesses as “desertion”) and the attainment of pensionable age among others.

Equally common cause is the fact that the SMM Holdings has been experiencing serious liquidity challenges leading to its failure to pay off dues to former employees, some of whom are the current appellants. It is those unpaid salaries, wages and other benefits that constitutes the basis upon which the appellants insist to date that they have a right of retention over the company houses.

The amounts owed to the appellants by the respondent are varied depending, of course, on the positions (or grades) they held and the duration of their employment with the SMM Holdings.

Significantly, it is common cause that the houses which form the subject matter of the dispute belong to the respondent company.

The parties through their respective witnesses (and ultimately through submissions by counsel) expressed starkly contrasting views on the important legal question on whether or not the appellants enjoy a lien over the houses on the basis of their unpaid salaries and wages. The two witnesses for the respondent steadfastly maintained that no such lien exists and if aggrieved by the non-payment of their outstanding dues, the appellants ought to pursue their claims in courts of law instead of clinging, as they do, onto the company houses. On this latter issue (i.e. whether the Appellants can seek recourse in the courts of law to recover outstanding dues) the Respondent's first witness, Ms. Nyambiya was cross-examined at considerable length on whether such an option was available to them given the provision of s 6 of the Reconstruction Act, to which she answered in the affirmative. She insisted that that avenue is still open to the appellants and that in her view effectively negated the notion of the lien as the basis of remaining in the company houses.

She however conceded that following negotiations between the current administrator of the Company one Gwaradzimba, that plans were afoot to settle the salary arrears using company houses and stands. In that regard it was envisaged, according to Nyambiya, that every employee who was owed salaries (and other creditors) would be a potential beneficiary.

The appellants through six of their number as witnesses all echoed the same sentiment namely that they enjoy a right of retention of the company houses which right according to them emanated from the unpaid dues owed to them by the respondent.

The second thread which ran through the appellants' evidence was that the respondent made a general undertaking to sell the houses in question to the appellants in the event it (i.e. respondent) failing to pay off the outstanding dues. This was after the respondent had

communicated to each appellant an acknowledgement of its indebtedness to him/her. They all expressed the view that as soon as they were paid their dues they were prepared to vacate the said houses.

Collectively, the witnesses further testified that they were equally keen to have their unpaid dues set off against receipt of the ownership of the houses. They further expressed the apprehension that their eviction from the premises would effectively frustrate such an outcome. That was so, particularly in view of the fact that the respondent had as of the date of the proceedings been under reconstruction for over 15 years with no hope of its resuscitation seemingly in sight.

At the conclusion of the trial, apart from dismissing the claim for arrear rentals as aforesaid, the court *a quo* dealt to some considerable length on the two pivotal issues namely, firstly whether the appellants could by virtue of the common law creditor's lien, exercise a right of retention of the properties until the respondent extinguished its indebtedness to them. Secondly the court considered the question of whether the appellants could legitimately hold onto the company houses in the interim pending the disbursement of their dues on the basis of the alleged respondents' pledge to allow such occupation.

On the latter question, the court *a quo* concluded that an acknowledgement of indebtedness could hardly be a basis for refusing to vacate an employer's property consequent to the termination of one's employment contract. Further, the court found that there was no evidence placed before it that the respondent had authorized in writing the appellants' continued stay in the company houses. It therefore rejected that defence.

On the question of the lien, court discussed the legal concept of a lien and briefly explained the various types of lien. It then zeroed-in on the creditors lien which was the bedrock of the Appellants' defence. It concluded that it had not been shown from the facts and the applicable law that the prerequisites of such a lien had been satisfied and rejected such defence. It accordingly granted the eviction claim with costs.

Aggrieved by that outcome, the appellants appealed to this court. The grounds of appeal were framed as follows:

GROUND OF APPEAL

1. *The Learned Magistrate erred at law when he failed to recognize that appellants had right of retention (lien) against the Respondents' properties/ houses based on the fact that appellants were owed various sums of money by the respondent for unpaid services rendered and such was acknowledged by Respondent, thus debtor creditor lien qualifies therefrom.*
2. *The court a quo misdirected itself when it concluded that the appellants failed to prove that the administrator undertook to offset arrear salaries owed with the houses in question. The onus had shifted to respondent on the issue to dismiss the evidence placed before the court a quo in relation to notices issued by the Administrator outlining his intention to settle the ex-employees' arrear salaries and other benefits with the houses in question.*
3. *The Learned Magistrate erred at law when he proceeded to determine that the appellants had a cause of action to fight their dues in the Labour Court, when in fact permission to one the respondent was denied as a result of the administrators' undertaking to settle the arrear salaries with houses occupied by the appellants after paper evaluation has been undertaken. Thus, the court a quo ought to have dismissed that there was no reason to cause eviction therefrom.*
4. *The Magistrate erred to cause appellants' evictions at this juncture when there was no clarity on how they are going to be paid their dues by the respondent. Further there was no justification to order costs of suit when the respondent had also claimed non-existent arrear rentals from appellants.*

The appellants' prayer in this appeal reads as follows:

"Wherefore appellants' pray for setting aside of the court a quo's order for eviction and that the appellants be ordered to stay in the houses in question pending settlement of their arrear salaries by the respondent or until such time they are offered to buy the properties in question in lien of their arrears due."

The appeal stands resisted by the respondents in whose heads of argument it was contended that the common law right of retention did not avail the appellants as the essential requisites thereof were not satisfied. The contra-argument by the respondent was that it (i.e. respondent) had

satisfied that as owner of the property, it had a right through the *rei vindicatio* action to claim its properties back from the appellants all of whom are its former employees the latter whose right of occupation of the same lapsed simultaneously with (or shortly thereafter) the loss or expiration of their respective contracts of employment. Several cases were cited in support of this contention notably the following; *Esther Chiyadzwa v Betty Maguwu* HH 31/2011 and *Frank Nyakubadza v SMM Holdings (Pvt) Ltd Under Reconstruction* HMA 20/17.

The *actio rei vindicatio* is a common law remedy available to the owner of a thing to claim possession of his property from whom is in possession of the same without his consent. In *Oakland Nominees Ltd v Gelria Mining & Investment Co Ltd* 1976 (1) SA 441 (A) at 452A Holmes JA said:

“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.”

In *Susan January v Norman Maferefu* SC 14/20, UCHENA JA referred to a passage from *Savanhu v Hwange Colliery Company* SC 8/15 where the following was said:

“The 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(A):

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 invested with same right enforceable against the owner (e.g. a right of retention or a contractual right).

UCHENA JA further referred to Gibson JTR Willies’ Principles of Southern African Law (7th ed, Juta & Co. Ltd, Cape Town, 1977) at p. 203 where it was pointed out that it is immaterial whether the possessor is *bona-fide* or *mala fide*, the owner of a movable may recover it from any possessor without having to compensate him even from a possessor in good faith who gave value for it. The author further states as follows regarding the vindication of immovable property:

“In the case of land, the absolute owner of the land may claim the ejectment of any person in possession of it, and also an interdict restraining persons from continuing to trespass in it, as caused by the trespassers”.

Stemming from the above are two distinct requirements for the common law action of the *actio rei vindicatio*. Firstly, the plaintiff must prove ownership of the property and that the

defendant was in possession of the thing at the time that the action was instituted. Both of these are common cause in the present case.

If the owner establishes these requirements, the onus shifts to the defendant to assert and establish a right to retain possession of the thing. In *Chetty v Naidoo (supra)* where it was stated that the onus in a vindicatory action is based upon the fundamental principle that the owner is entitled to vindicate property wherever he finds it and that the rules pertaining to the onus of proof are all derived from this principle which principles are to the following effect.

Effectively there are four defences available to a defendant on a claim of *rei vindicatio* namely;

- (i) That the appellant is not the owner of the property in question.
- (ii) That the property in question no longer exists and can no longer be identified
- (iii) That the respondent's possession of such property is lawful
- (iv) That the respondent is no longer in physical control of the property (*Chetty v Naidoo (supra)* and *Respondents of Joe Shovo Community v Thabelish Homes 2010 (3) SA 454 (CC)*),

In the present case the appellants' defence to the action appeared to be based on the third. Put in context therefore, the question that emerged in the proceedings *a quo* was whether the appellants' possession of the houses was lawful on the basis of the lien or the setoff or both.

The Question of the Lien

The crisp question for determination in the court *a quo* was and, in this appeal, remains whether the appellants enjoy a right of retention otherwise known as a lien over the houses they currently occupy by virtue of the various amounts they are owed by the respondent.

A lien is a right of retention which arises from the fact that one has put money or monies worth into the property of another. Two broad types of lien exist namely enrichment liens and debtor -Creditor liens, (See Silberberg and Schoemans' *The Law of Property* 3rd edition by Kleyn and Baraine (hereinafter abbreviated as simply as Silberberg and Schoeman) at page 464).

The appellants evidently relied on what they believed was a debtor-creditor lien. Reliance was placed on the following cases; *City of Masvingo v Zimbabwe Urban Council Workers Union and Two Muzaya Auctioneers and Sheriff of Zimbabwe HMA 48/17* where the following was said;

“A lien is basically a right of retention, or jus retentionis. It is same form of self-help that arises by operation of the law....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 conferral rights. Debtor-Creditor liens confer real rights on a person who has done work on another’s property or rendered service in pursuance of a contract”.

Another dictum supposedly in support of the lien argument was extracted from the case of *Fletcher and Fletcher v Bulawayo Waterworks Co. Ltd* 1915 AD 636 where the court had this to say;

“The other type of lien, a debtor-creditor lien is available of anyone who has by contract, performed work on behalf of another or on the property of another. It confers a personal right available only against the other party to the contract (or third parties with knowledge of the lien) to retain the property until the contract price”.

On the basis of the above it was therefore argued that the appellants enjoy such a right to retain the Respondents houses until the payment of their outstanding salaries and benefits. They however conveniently failed to disclose that this type of lien is not available to a person owed by another by virtue of a contract of employment. In this regard Silberberg and Schoeman had this to say at page 464;

“The latter (i.e. debtor-creditor liens) are rights of retention which are conferred on a person who has done work on another’s property or rendered a service in pursuance of a contract (other than in the course of employment). (emphasis mine)

The examples of debtor and creditor liens listed in Silberberg and Schoeman amply demonstrate that such right of retention relate to a contract for services rather than a contract of service.

The case of *Arundel School Trust v Pettigrew* 2014 (1) ZLR 596 hardly aids appellants’ cause in this regard given that it related to a situation (unlike here) where the employer-employee relationship still subsisted. It is distinguishable from the present case not least because the right of retention was not based on the debtor-creditor relationship but rather on the of terms contract of employment itself albeit the validity of whose termination was disputed. In any event the weight of authorities is such as to negate the notion that a former employee can legitimately cling onto

property belonging to his her ex-employer supposedly on the basis of either a pending challenge to his dismissal or on the ground that he is owed outstanding dues. A few examples will suffice.

In *Forestry Commission v Betty Muwonde* HH 9/18 Charewa J had this to say at page 3 of the cyclostyled judgment:

“The law with regard to rei vindication, particularly in the context of employment disputes is also trite. Once the applicant has shown that it is the owner of the thing, which still exists, is clearly identifiable and was in the respondent’s possession, the onus is on the respondent to show the existence of a contractual right to possession. That right cannot exist where the contract is invalid or has been terminated.”

The Learned judge continued in that vein thus:

“Whether the termination of the employment relationship is unlawful, or whether there are any damages due to a respondent as a consequence of the termination of employment seems to me irrelevant. An employee stands dismissed as long as the employer is not willing to reinstate him or her. For that reason, no right of retention of the property of the employer accrues to the employee as the contract remains terminated.”

More pertinently, in *William Bain and Co. Holdings (Pvt) Ltd V Nyamukunda* HH 309/13, a former employee while conceding that he held no lien over his former employer’s property (in the form of a house and a motor vehicle) non the less argued that he had a right of retention over the same on the basis that he was owed some terminal benefits. He (as here) indicated that he was prepared to surrender the said property but wanted it to be tied to the payment of his terminal benefits. Rejecting this argument Mathonsi J had this to say:

“In my view, it is the height of turpitude for the respondent to hold on to both the vehicle and the house years after the termination of the employment contract under circumstances where he has no rights whatsoever over the properties...The fact that the respondent is owed terminal benefits is not a ground for refusing to surrender assets.”

In *Montclair Hotel and Casino v Farai Mukutswa* HH 200/15 Mathonsi J reiterated the same position when he remarked as follows”

“Just where do former employees think they derive the authority to hold onto property belonging to a former employer give to them for use during the subsistence of the contract of employment? This matter is one of several of its nature which are now finding their way to the court with alarming frequency of late where a dismissed employee would simply not surrender the employer’s property but would cling to it as if life depends on it”

The unambiguous message conveyed by the above cases is that no right of retention accrues to a former employee in respect of property belonging to former employer by virtue of being owed terminal benefits or by virtue of his or her challenge to the dismissal. In my view the fact that the former employer is partially shielded from potential litigation imposed by section 6 (b) of the Reconstruction Act which requires him or her to first obtain the administrator's consent does not alter this position.

To conclude this segment therefore I find that the decision of the court *a quo* in rejecting the appellant's defence of the right of retention supposedly derived from debtor-creditor lien cannot be faulted. The grounds of appeal hinging on this argument therefore stand to be dismissed.

The question of the set off

In this regard the appellants' argument is that the respondent undertook to set off salary arrears as against the houses which the appellants occupy. It is pertinent to observe that none of the appellants (as defendants then) specifically pleaded this defence. This explains why neither the PTC minute nor the Parties' opening address specifically referred to the question of set off. It is hardly surprising therefore that the court *a quo* paid scant regard to the same (something that the appellants seem aggrieved by in this appeal).

The question first surfaced during the cross examination of the 1st plaintiff's witness when she was asked what the respondent's administrator intended to do to settle the respondent's indebtedness to the appellants. But even then, that issue was not pursued with any vigour. Be that as it may, the witness indicated that tentatively the overall intention was to settle the matter of the outstanding salary arrears by allowing the employees to purchase houses or stands using the said arrears. She was quick to point out that although that this was conceived idea it yet to come to fruition. She also referred to some process by the Department of Physical Planning that still needed to be done to give effect to the intended settlement.

The issues in litigation should be stated specifically in the pleadings. The three main functions of pleadings are firstly to inform the parties of the issues in dispute between them to enable them to prepare for trial, to inform the court of the issues between the parties so that it may know the limits of the dispute before it and thirdly, to place on record through the pleadings in case one or other of the parties seeks to reopen the same dispute after it has already been

determined, See *Keavney & Anor v Msabaeka Bus Service (Pvt) Ltd* SC 22/18. In that case the legal practitioner had advanced during the trial defence of confession and evidence, whereas he had pleaded a defence of denial. The court concluded that the failure to plead the defence that was then advanced at trial suggested one of three explanations, viz (a) sheer idleness and incompetence on the part of the pleader; or (b) a deliberate and unconscionable attempt to avoiding attracting onus of adducing evidence or (c) the defence was an afterthought.

The question of the alleged set off ostensibly predicated on an undertaking by the Respondent to extinguish its indebtedness to the appellants by allowing the appellants continued occupation of the company houses being conspicuous by its absence in the defendants' respective pleas, the trial court cannot be faulted for not specifically addressing the same in its judgment. It was an issue that was not specifically pleaded although it intermittently cropped up when evidence was being led.

I find myself constrained to comment on the set off argument on which this appeal is partly predicated. In this regard one observes that a perusal of the documentary evidence availed to the court *a quo* reveals at very best a contemplation by the parties to arrive at settlement to resolve the impasse. That in my view hardly suffices as a defence against the appellants' eviction.

In paragraph 1 of the notice dated 18 September 2019 (thus postdating the issuance of summons) marked as exhibit E of record, the following was stated;

*“Please take notice that the company shall offer ... property/houses/stands to offset salaries arrears to employees.
The details on the type, location and value of the properties to be offered will be provided in the offer letters”*

The notice then proceeded to enumerate the steps that would follow. The other documents availed to the court equally fall short of a definitive offer in respect of specific houses to constitute a valid defence to an action for eviction.

In the premises therefore, I find that neither of the two defences namely that of a lien and that of a set off (the latter as stated was not specifically pleaded) offered a valid defence at law to ward off respondent's action for their eviction. The magistrate's judgment can therefore not be impugned and the appeal stands to be dismissed.

The appeal against the award of costs in favour of the respondent

In this ground of appeal the contention is that there was no justification in the court awarding costs in favour of the respondent given that the latter's claim for arrear rentals was unsuccessful. In other words both sets of parties were to some extent successful.

The general rule is that the predominantly successful party is entitled to its costs. However, the determination of who the successful party is not always straightforward as many situations may arise. In the current scenario whereas the Respondent was successful in its claim for the eviction of the Appellants, it however failed in the second claim for the recovery of arrear rentals. It is a well-established principle that where the plaintiff makes more than one claim and succeeds only in part, the court will, where the issues are separate and distinct (as in the present matter), award costs in respect of each issue to the party who succeeds on it, (see *Clarke v Bethal co-operative Society* 1911 TPD 1152, *Kunze v Steytler* 1932 EDL 4; *Union Share Agency & Investment Ltd v Green*, 1926 CPD 129; *Estate Wege v Strauss* 1932 AD 76 at 86).

In the *Union Share Agency & Investment Ltd v Green*, 1926 CPD case, GARDINER, J., said:

'Generally speaking, the party in whose favour judgment is given should get the costs of the case. But where a party, though he has succeeded in obtaining judgment, has failed in certain substantial issues, for the raising of which he was responsible, then, if the costs of those issues are severable from the general costs of the case, he should be ordered to pay the costs of those issues. The victor had no right to make defeat unnecessarily expensive for the vanquished, and if he has not been content to rely on a good point, but has added to the expense by raising weak issues, he should bear the additional expense to which his adversary has been put.'

Similarly, in the *Estate Wege v Strauss* case, Wessels ACJ had this to say in this regard:

“This court has on several occasions laid down that if issues are distinct and severable the successful party on each issue is as a general rule entitled to his costs on that issue. This is a general rule which all courts should follow, but it is not a hard and fast rule and considerable discretion must be left to the trial judge in regard to costs”

In the context of this matter the claim for eviction and the one for the arrear rentals though related were separate and distinct and the Respondent (as plaintiff then) was entitled to an award of costs on the eviction claim on which it succeeded. The Appellants (as defendants) were similarly entitled to costs on the arrear rentals claim in respect of which they were successful.

There is no indication on record that the court *a quo* applied this principle in arriving at its order on costs. In its heads of argument, the respondent hardly touched on the subject of costs despite it having been specifically raised as a distinct ground of appeal. The issue of the arrear rentals on which the appellants succeeded proved to be not only highly contentious but consumed the bulk of the trial time in the proceedings *a quo*. In light of the foregoing, I find that there is justification in interfering with the court's decision on costs. However, the proposal by the appellants to order that each party bears its own costs is more practical in the circumstances. Accordingly, the court *a quo*'s order on costs will be interfered with by its substitution with one ordering that each party meets its own costs for those proceedings.

It is also for precisely the same reason that each party to this appeal will be ordered to meet their own costs for the appeal given that whereas the Respondent has succeeded in warding off the challenge to the eviction order, the Appellants have equally succeeded in having the order for costs reversed.

Accordingly, the following order is hereby made.

ORDER: IT IS HEREBY ORDERED AS FOLLOWS:

1. The appeal against the court *a quo*'s decision ordering the eviction of the appellants from the respondent's houses is hereby dismissed.
2. The order by the court *a quo* awarding costs of suit to the respondent is hereby set aside and substituted with the following
"Each party to bear its own costs"
3. Each party to bear its own costs for this appeal.

ZISENGWE J.

WAMAMBO J agrees

Ruvengo Maboke and Company Legal Practitioners
Chuma Gurajena and Partners Legal Practitioners