

ZIMBABWE COMMERCIAL FARMERS UNION
versus
TAPIWA NYAMAKURA

HIGH COURT OF ZIMBABWE
CHIGUMBA J
HARARE, 3 March 2016, 23 March 2016

Opposed Application

P. Kawonde, for the applicant

D. Muskwe, for the respondent

CHIGUMBA J: This is an application in which the surrender of a motor vehicle Isuzu Extended Cab Vehicle Registration number ABK 7743 is sought to be compelled from the respondent and anyone claiming possession from him, failing which authority is sought to be conferred on the Deputy Sheriff to seize and attach said vehicle and surrender it to the applicant. The respondent is a former employee of the applicant. The issues that arise for determination are simple. Guidance on these issues has already been given by the Supreme Court. In formulating the matters for determination in a matter materially similar to the one under consideration, the Supreme Court stated that;-

“This appeal deals with the oft recurring question whether an employee whose contract of employment has been terminated, and who has appealed to the Labour Court against that termination, is entitled, pending resolution of the appeal, to retain a motor vehicle allocated to him for the performance of his duties during the course of his employment. It also addresses the question of the jurisdiction of the High Court in these circumstances to grant relief to the employer under the *rei vindicatio*. See *Joram Nyahora v CFI Holdings Private Limited*¹.”

At the hearing of the matter, when attention was brought to counsel for the respondent to the abovementioned case, he submitted that this matter differs materially, on the facts, from *Nyahora v CFI (supra)*. Let us examine the facts of this matter. The applicant avers in its

¹ SC 81-14

founding affidavit that, the respondent is its former regional manager, a fact which is common cause. It is also common cause that the respondent resigned his post on 8 January 2015. The parties are agreed that the respondent was entitled to the exclusive use of a motor vehicle as part of his conditions of service. They are also agreed that the respondent was expected to relinquish possession of his official motor vehicle, on the date of his resignation. The parties agreed that possession would be relinquished the following day, 9 January 2015. The respondent has failed and refused to hand over the vehicle, on the basis that he should be paid his outstanding salaries of USD8 723-33 first.

In these circumstances, does the respondent have a 'lien' over the motor vehicle which entitles him to retain possession until his terminal benefits are paid in full? So far, the facts are on all fours with *Nyahora v CFI (supra)*. In the notice of opposition, filed of record on 4 June 2015, the respondent avers that there was a subsequent agreement between the parties that he could hold onto the vehicle until such time as the parties entered into an agreement pertaining to his terminal benefits. He denies that he agreed to hand over the vehicle on 9 January 2015. He makes reference to negotiations done by the parties' respective legal practitioners during the course of which the applicant was advised that 'the vehicle was parked at a safe place. The respondent avers that he is perfectly willing to hand over the vehicle in question, but only after the applicant furnishes him with a payment plan for the settlement of his terminal benefits. This, in his estimation, constitutes 'a claim of right' against the applicant.

Naturally, the applicant denies ever making an undertaking to first pay the respondent's terminal benefits before demanding the surrender of its vehicle. The applicant is proceeding in terms of the *rei vindicatio*. The question of jurisdiction to hear such a claim has now been conclusively determined in our favor as follows:-

"As submitted on behalf of the respondent, the right of an individual to approach the High Court seeking relief other than that specifically set out in s 89 1 (a) of the Act, has not been abrogated. Nothing in s 89(6) takes away the right of an employer or employee to seek civil relief based on the application of pure principles of civil law, except in respect of those applications and appeals that are specifically provided for in the Labour Act. Nor is there contained in s 89 any provision expressly authorizing the Labour Court to deal with an application, such as in the instant case, for

the common law remedy of *rei vindicatio*. Such applications fall squarely within the jurisdiction of the High Court. *Nyahora v CFI (supra)*.²

On the merits of such an application, this is the guidance given by the Supreme Court:-

“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. *Nyahora v CFI supra*.³”

The real issue that falls for our determination is whether the respondent has a claim of right within the context of the *rei vindicatio*, of such scope that it is capable of defeating the applicant’s right to recover the motor vehicle in question from him. Again we have been guided as follows:-

“...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”.

The contract which is being referred to is the contract of employment. The claim of right must arise from the terms of the contract of employment which governed the parties rights and liabilities and stipulated what ought to happen in case the contract of employment was terminated. It is common cause that the respondent resigned and that the contract of employment was terminated on 8 January 2015. It is also common cause that in terms of the contract of employment the respondent was supposed to surrender the motor vehicle to the applicant. It is my view that the respondent did not have a claim of right which arose from the terms of the contract, which entitled him to retain possession of the vehicle.

² Page 7

³ Page 7

Having made this finding it is pertinent to consider whether the alleged agreement between the parties, entered into subsequent to the termination of the contract of employment, gave rise to an actionable claim of right on the part of the respondent which entitles him to hold onto the vehicle. Assuming that such an agreement was indeed entered into, in my view, that agreement could not purport to alter the terms of the contract of employment which had ceased to exist on 8 January 2015. It is trite that once a contract of employment has been terminated, any benefits extended to an employee from that relationship cease to accrue. See *Zimbabwe Broadcasting Holdings v Gono*⁴, *Grain Marketing Board v Mahachi*⁵. Does an agreement of such a nature, assuming it exists, confer 'a lien' over the motor vehicle as alleged by the respondent?

The three types of lien, or rights of retention were set out in the case of *Nexbak Investments Private Limited & Anor v Global Electrical Manufacturers Private Limited*⁶, in which Professor R.H. Christie in *Business Law In Zimbabwe* pp 454-455 is quoted with approval, as follows:-

“A right of retention, or a lien, arises by operation of law from the principle that no-one should be unjustly enriched at the expense of another. A person who has incurred expenditure on the property of another, movable or immovable, and who is in possession of that property, is entitled to retain possession until paid sufficient compensation to prevent the owner being unjustly enriched at his expense. The amount of this compensation will depend on the circumstances. A possessor who has incurred expenses, i.e. expenses which must be incurred to prevent the destruction or deterioration of the property, has a right of retention until paid the amount of his expenditure. This is known as a salvage lien, and it gives the possessor a real right against all the world. Useful expenses, i. e. expenses which have enhanced the market value of the property, give rise to an improvement lien, also valid against the whole world, for the amount of the enhancements. *Fletcher and Fletcher v Bulawayo Waterworks Co. Ltd* 1915 A.D. 636. The third type of lien, a debtor and creditor lien, is available to anyone who has, by contract, performed work or incurred expenditure 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.”

The respondent has not submitted that he put his own money on the vehicle in question, and in my view he does not qualify for a salvage lien, an improvement lien or a debtor creditor

⁴ 2010 (1) ZLR 8 (H)

⁵ HC 3881-15

⁶ 2009 (2) ZLR 270 (S) @274

lien for the simple reason that a lien arises from the fact that one man has put money or money's worth into the property of another. It follows that even if the parties had entered into a separate agreement after the contract of employment was terminated, such an agreement would not have given rise to a lien or a right of retention capable of defeating or being a shield against a vindicatory action. For these reasons, it be and is hereby ordered that;-

1. The respondent or any person in possession of the applicant's property namely an Isuzu Extended Cab vehicle registration number ABK 7743 issued by the applicant to the respondent, be and is hereby directed to surrender the said property to the Deputy Sheriff upon service of this order.
2. In the event that the respondent or any person in possession of the aforesaid vehicle fails to comply with this order, the Deputy Sheriff be and is hereby authorised to seize and attach such property and hand it over to the applicant.
3. The respondent pays the costs of this application.

Kawonde & Company, applicant's legal practitioners
Muskwe & Associates, respondent's legal practitioners