CFI HOLDINGS LIMITED
versus
PEGGY RAMBANAPASI
and
TAWANDA CHINOERA
and
JEPHINIAS CHIUMBURU

HIGH OF ZIMBABWE
MANGOTA J
HARARE, 26 September, 2017 and 18 December, 2017

**Opposed Matter**

*N Chamisa,* for the applicant
*I. Chiwara,* for the respondent

MANGOTA J: A man who, without justification, holds on to another person's property receives little, if any, sympathy from anyone let alone the court. *A fortiori* when he, directly or indirectly, pleads a non-existent claim of right to the property. Where such has been demanded by its owner, the possessor must simply hand it over to him without further ado. It is a complete waste of time for the possessor to cling on to what he know does not belong to him under the pretext that he has the right to retain the property. This is all the more so where he cannot prove his purported right of retention.

The above-described set of circumstances is on all fours with the unwholesome conduct of the three respondents. All of them worked for the applicant in various capacities. They occupied senior management positions in the applicant. Their positions entitled each one of them to a motor vehicle as a condition of his, or her, service.

The first respondent was allocated a Toyota Hilux Double Cab, registration number AAX 2053. The second respondent had an Isuzu KB 300 TDI Double Cab, registration number ABP 8058 and the third respondent was allocated a Toyota Hilux Vigo Double Cab registration number ABD 0449.

The applicant terminated the contract of employment of each respondent on 26 January, 2016. It communicated that fact through a letter which it addressed to each respondent. The letter reads, in part, as follows:

> "This letter serves to inform you of the termination of your contract of employment in terms of the conditions of service of the company. These conditions of service constitute the business's currently applicable code of conduct. ……………..
> ……….
> ……….
> ……….
> Given the foregoing, may I kindly ask you to work towards vacating your work place at end of day, Tuesday 26 January 2016, and to handover any company assets in your possession to the undersigned. ………
>
> ………
>
> S.P. Kuipa
> GROUP CHIEF EXECUTIVE OFFICER". (emphasis added)

The clear and unequivocal communication of the applicant to the respondents deserved nothing but a clear and unqualified response. The response should have been in both word and deed as opposed to what the three respondents did.

The communication called upon each respondent to hand over to the applicant its assets. Amongst such assets are the three motor vehicles ("the cars") which are the subject of this application. These, it has already been stated, had been allocated to the respondents as part of their conditions of service.

The termination of the respondents' contracts of employment terminated the latter's conditions of service. The expectation of the applicant was that these would simply hand over to it the cars without further ado. That, unfortunately for it, did not occur. The respondents held onto the cars to a point where the applicant had no choice but to file the present application.

The application is one for *rei vindicatio*. The applicant wants its three cars returned to it. Its position is that the reason for which the cars remained in the possession of the respondents has come to an end. It, therefore, moved the court to grant it its application.

The respondents opposed the application. They gave a litany of reasons for retaining the cars. They said:

(a) the contract of employment which they each concluded with the applicant was, or is, still extant;

(b) they are holding on to the cars with the applicant's consent;

(c) the cars were offered to them as part of their retrenchment package which offer they each accepted.

(d) they are exercising a lien over the cars for the amounts owed to them by the applicant.

Whether or not the contract of employment which each respondent concluded with the applicant is subsisting depends on what evidence he/she produced to substantiate his/her claim. Each of them stated that he/she challenged the termination of his/her employment contract. He/she, did so to the Ministry of Labour, it was claimed.

The supplementary affidavit which the respondents filed on 15 September, 2017 dealt with the issue of termination of their employment contract(s) in a decisive manner. It reads, in part, as follows:

> "3. On the 24th August 2016, the respondents, through its (*sic*) lawyers, referred the issue of the purported dismissal to the Ministry of Labour for conciliation. The basis of that reference was that we had all been unfairly dismissed. Conciliation did not succeed and a certificate of no settlement was issued.
>
> 4. The matter was then decided by the Ruling Officer, Mrs L. Sigauke on 17 February 2017. The Ruling Officer held that the dismissals were unfair, and ordered that all the respondents be reinstated back to their positions without loss of pay and benefits within two weeks from the date of the award. The Ruling Officer ordered in the alternative that if reinstatement was no longer possible, the applicant had to pay damages in lieu of reinstatement.
>
> 5. That decision of the Ruling Officer was confirmed by the Labour Court on the 16th of June, 2017 which also ordered reinstatement or alternatively damages in lieu of reinstatement" [emphasis added].

The applicant, it is noted, did not quarrel with the decision of the Ruling Office or that of the Labour Court. It refused to reinstate the respondents as had been ordered. It, instead, opted to implement the alternative order.

That stated fact clears the air on the allegation that the contract is still subsisting. It is not. The respondents cannot, therefore, continue to hold on to the cars on the basis of a non-existent contract of employment. If the contract was not terminated by the letter of 26 January, 2016 the Ruling Officer's decision as confirmed by that of the Labour Court terminated the respondents' contracts. The averment which is to the effect that contract is still intact cannot, therefore, hold.

The respondents' second and third reasons for holding on to the cars are without merit. It is not correct that they have the applicant's consent to retain the cars. If they did have such

consent, the present application would not have been necessary. The fact that the applicant persists with it shows that it did not consent to them holding onto its cars. The respondents did not produce any evidence which showed that the cars were offered to them as part of their retrenchment package. Nor did they show that they accepted the alleged offer. They made some bare and unsubstantiated claims which the applicant rebutted in a very effective manner.

The respondents' last line of defence was that the applicant's choice of wanting to implement the Ruling Officer's alternative order entitled them to payment of damages. They said it remained indebted to them for the said damages. They submitted that they would, therefore, hold onto the cars as a lien for whatever damages are due to them from the applicant.

The respondents, it is evident, did not read and understand the circumstances which give rise to a lien. They are, in this regard, referred to the remarks of SANDURA JA who discussed that matter at length in *Nexbank Investments (Pvt) Ltd & Anor* v *Global Electrical Mfrs (Pvt) Ltd & Anor*, 2009 (2) ZLR 270 (D) at 273 G-H and 274 A-C wherein the learned judge, quoting a text in Professor R.H. Christie's *Business Law in Zimbabwe* p 454-455, stated as follows:

> "A right of retention or 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 necessary 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 value of the property, give rise to an improvement lien, also valid against all the world, for the amount of the enhancement: *Fletcher and Fletcher* v *Bulawayo Waterworks Co. Ltd* 1915 AD 636. The third type of 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 the knowledge of the lien) to retain the property until paid the contract price" (emphasis added).

The respondents' case, it is evident, does not fall into any of the above described categories of lien. They did not say, and in fact they did not, incur expenditure on the cars. They, if anything, continue to cause deterioration of the cars which they are in constant use of. They cannot claim a salvage lien on the cars. They did not enhance the market value of the cars. They do not qualify under the debtor and creditor lien relationship. They did not perform work on the cars. Nor did they incur any expenditure on the same.

The learned judge made a clear and unqualified statement in regard to the debtor and creditor lien. He stated at paragraph (c) of his above cited judgment that:

> "A debtor and creditor lien gives no right of retention over other property of the debtor that is in the possession of the creditor (whether in pursuance of the contract or not) but upon which he has not actually performed work in respect of which he claims payment"
> [emphasis added]

A clear reading of the above *dictum* shows that the respondents' claim to a lien of the cars was misplaced. Any doubts which may be entertained by the respondents on the issue at hand is easily removed from their minds when they read such case authorities as *Raymer & Co* v *Goldberg & Goldberg*, 1912 SR 167, *Hotel Victoria (Rhodesia) Ltd* v *Alexander*, 1952 SR 33, 1952 (2) SA 637.

The respondents' right of retention of the cars is without merit. They all admitted that the cars belong to the applicant. They should, therefore, hand the cars over to their owner without further ado.

It is trite that no one is allowed to hold on to someone's property against the latter's will. As was stated in *Nyahara* v *CFI Holdings (Pvt) Ltd*, SC 81/14

> "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 anyone 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……"

*In casu*, the applicant did not merely allege that it is the owner of the cars. It proved its ownership of the same on a balance of probabilities. The cars were in the possession of the respondents at the time that the application was filed. They still are.

The applicant proved its case on a balance of probabilities. The application is, therefore, granted as prayed.

*Matsikidze and Mucheche*, applicant's legal practitioners
*Coghlan, Welsh and Guest,* respondents' legal practitioners