

NATIONAL BLOOD SERVICE ZIMBABWE
versus
EMMANUEL MASVIKENI

HIGH COURT OF ZIMBABWE
ZHOU J
HARARE, 18 July, 2017

Opposed Application

O. Kandongwe, for the applicant
N. Ncube, for the respondents

Zhou J: The respondent is a former employee of the applicant. His contract of employment was terminated. The papers filed in this matter show that the Labour Court dismissed his appeal and upheld the termination of the contract of employment. The respondent according to the papers in this matter, has instituted proceedings for leave to appeal against the judgment of the Labour Court.

The application *in casu* is for the recovery of a motor vehicle which was availed to the respondent pursuant to a scheme put in place by the applicant for its employees. In terms of that scheme the respondent would pay the purchase price for the motor vehicle through monthly deductions from his salary. It is common ground that following the termination of his contract of employment the respondent has not paid the monthly sums towards the purchasing of the motor vehicle. In terms of the agreement between the parties, the applicant remains the owner of the motor vehicle until the full purchase price agreed upon has been paid. The applicant has instituted the present application to recover the motor vehicle from the respondent. The application is opposed by the respondent.

The instant application is in essence an *actio rei vindicatio*. Both parties are agreed that the requirements for that action are established. The only issue for determination is whether the respondent has any defence to the *actio rei vindicatio*. The defences to that cause of action are settled in this jurisdiction.

In opposition, the respondent advances two contentions, namely (1) that he is entitled to retain the motor vehicle because he has made some payments towards the purchase price; and (2) that by reason of the fact that he is challenging the termination of his contract of employment then he is entitled to keep the motor vehicle pending the determination of his appeal.

The last ground can be easily disposed of. As the situation stands the respondent has been dismissed. There is no order of court which has set aside the termination of his employment. The application for leave to appeal against the judgment of the Labour Court does not have the effect of reinstating the respondent to his employment. Secondly and more significantly, the motor vehicle is one that has the distinct aspect of a purchase price. It is not a simple allocation for use but is in essence the subject of an agreement of sale. That is the reason why the applicant retains ownership until the full purchase price is paid irrespective of whether or not the respondent remained in the employment of the applicant. Put in other words, the pending challenge to the termination of employment has no relevance where the respondent has failed to pay the purchase price for the motor vehicle in terms of the agreement between the parties.

The first ground is an attempt to extend the operation of *ius retentionis* based on a lien to a situation where a party has paid part of the purchase price for a thing which is the subject of sale but has failed to pay the balance of the purchase price. No authority has been cited for the startling proposition. A lien is only exercisable against the owner of a thing that has been improved at the expense of another. The person who has incurred expense in improving the other's property is then protected by *ius retentionis* pending compensation for the improvement or, in the case of a mechanic, pending payment for the services rendered in respect of the particular motor vehicle. A lien is not available to a purchaser in respect of part of the purchase price paid for a thing in his possession.

In all the circumstances of this case, the court is satisfied that the respondent has not tendered any defence which is valid at law to the applicant's claim.

The applicant has sought costs on the attorney client - scale. That is a punitive order of costs which is reserved for cases where there is some misconduct on the part of a litigant to justify the penalty through costs on the higher scale. I am not satisfied that the facts of this case justify such an award of costs.

In the result, the relief is granted in terms of the draft order subject to amendment of the order relating to costs, so that costs are paid by the respondent on the ordinary scale.

Dube, Manikai & Hwacha, applicant's legal practitioners
Donsa – Nkomo & Mutangi, respondent's legal practitioners