

PEPPY MOTORS (PRIVATE) LIMITED
versus
AMCOTTS TRADING (PRIVATE) LIMITED
and
BLACKBOX INVESTMENTS (PRIVATE) LIMITED

HIGH COURT OF ZIMBABWE
TAGU J
HARARE, 8 & 15 March 2017

OPPOSED APPLICATION

O D Mawadze, for the applicant
I Chiwara, for the respondents

TAGU J: The applicant Peppy Motors (Private) Limited is seeking an order that-

“1. The 1st and 2nd Respondents or any of their agents and or employees, or anyone acting on their behalf or on his own are ordered to release and restore possession into the applicant and or its agents or employees’ custody within two (2) days of this order failure which the Sheriff of the High Court is hereby ordered and directed to do all things possible to restore possession and cause release into Applicant or its agents or, its employees’ custody and possession of the following motor vehicles:-

- a. 1 x Toyota Hilux Revo 2.8L 4X4 6Speed Automatic Double Cab, New Generation (Chassis No. MROBA3CDX00101439), Engine No.1GD-0017855) and;
- b. 1x Toyota Hilux Revo 2.8L 4X4 6Speed Automatic Double Cab, New Generation (Chassis No.mroba3cdx00002488) Engine No. IGD-0010383).

2. The Respondents are interdicted and restrained from interfering in any way with the Applicant’s activities regarding the two (2) motor vehicles mentioned in paragraph (1) above without any order of the court.

3. Costs of suit on a Legal Practitioner and Client Scale shall be borne by the Respondents jointly and severally the one paying for the other to be absolved.”

The applicant in its founding affidavit submitted that it was engaged by the Government of Zimbabwe to facilitate the purchase and import of ten (10) Toyota Hilux Revo 2.8L 4X4 6 Speed Automatic Double Cab, New Generation vehicles that it imported on a duty free basis specifically for use by the Government of Zimbabwe under the Ministry of Agriculture, Mechanisation and Irrigation Department Special Maize Production Program. All the 10 vehicles collectively worth US\$480 000 (FOUR HUNDRED AND EIGHTY

THOUSAND UNITED STATES DOLLARS) were duly cleared by the Zimbabwe Revenue Authority (ZIMRA) on 15 November 2016 as per Annexure “A”. The respondents who owned a bonded warehouse in terms of s 68 (1) (a) of the Customs and Exercise act [*Chapter 23.02*] where the vehicles were placed pending finalisation with the Zimbabwe Revenue Authority, despite that all the vehicles were cleared as per Customs and Clearance Certificates Annexures “C1” and Annexures “C2” have refused to release two (2) of the ten (10) vehicles mentioned above. It argued that it naturally follows that since the respondents’ bonded warehouse is a customs-controlled warehouse for the retention of imported goods until the duty owed is paid, in the case of duty –free goods, the owner of the warehouse (ie the respondents) cannot remain in possession of the property citing unpaid storage charges as the basis.

The respondents in their opposing affidavit submitted that the applicant and the respondents had a service agreement through which the respondents would offer storage space to applicant in pendency of customs, import duty and clearance compliance by the applicant with revenue and customs law. The terms of the agreement were *inter alia*, that the applicant would pay US\$200.00 per Vehicle Bond Letter and US\$ 5.00 per vehicle per day storage after 30 days from entry. This arrangement began on 3 August 2015 and the applicant has since brought forty three (43) vehicles to be kept in the respondents’ possession. The applicant then accumulated storage costs from the bonding of all these forty three vehicles and not simply for the ten vehicles. As of 21 November 2016 the applicant owed US\$ 49 038.00 in storage costs which amount was communicated to the applicant by the respondent’s lawyers in an attached e-mail marked Annexure “B”. As the applicant has failed, refused or neglected to pay the outstanding storage costs, the respondents have held on the two vehicles as a lien over its debt.

In its answering affidavit the applicant submitted that it was despoiled of the two vehicles and that the debt claimed as a defence to the relief sought does not suffice at law in that no debt is owed to the respondents as the applicant paid all its dues and respondents processed a release order of the motor vehicles as per the attached Annexure “D”. Constructively, when the release for the motor vehicles was done by the respondents and ZIMRA Officials ordered and directed applicants to take possession of same in terms of Customs, Excise and Import Clearance Law to its Bonded Warehouse facility after paying the prescribed fees as per Annexure “E” hereto which it did through its agents. Thereafter respondents resorted to self –help when they forcibly impounded the other two vehicles and

retained possession of same without applicant's consent thus wrongfully and forcibly depriving applicant of its possession.

The respondents in their heads of argument disputed that they released the said vehicles into the possession of the applicant's agents. They said other than the two vehicles which form the subject of the present application being physically in the respondents' bonded warehouse for over a year now, the applicant never had possession of the said vehicles. According to them the one key question for determination in this case is who had actual possession of the vehicles.

In my view the issues to be determined are whether or not the respondents had possession and later relinquished such possession of the said vehicles to the applicant and later repossessed them, and if not, whether the respondents can rely on lien as a defence.

In casu it cannot be disputed that the two vehicles in question were part of a larger fleet of vehicles imported into the country by the applicant which were kept at the respondents' bonded warehouse pending the finalisation of duty clearances. In essence it cannot be disputed that the said vehicles belonged to a third party, that is, the Government of Zimbabwe. Hence the vehicles were in the possession of the respondents at some stage.

The applicant claimed that the vehicles were later released to their agents as per Annexure "D" which is a release order. Perusal of exh "D" filed of record at p 14 of the record shows a release order dated 14 November 2016. Attached to the release order is a Bill of Entry for a vehicle with engine number 0017855 which tallies with one of the vehicles in question. However, the Customs Clearance Certificate attached to that Bill of Entry is for a vehicle with engine number 0017855. A second release order dated 15 December 2016 also attached to a Bill of Entry dated 15 December 2016 as well as the Customs Clearance Certificate is for a vehicle with engine number 0017736. This does not tally with engine number 0010383 for the second vehicle in question. What this clearly means is that either the applicant filed by mistake the wrong papers or the vehicle was never released at all. It is not clear why the vehicle that had been initially released was later retained by the respondents. The applicant has managed to prove that after one of the two vehicles had been released to the applicants, the respondents despoiled the applicant of that vehicle. I found that the release order relied on by the respondents dated 14 November 2016 to be unhelpful in so far as it has nothing to do with the two vehicles in question. Assuming, but not accepting that both vehicles were not released at some stage by the respondents to the applicant's agents, the issue to be decided is whether or not the respondents can rely on the defence of lien.

In the case of *Bak Storage (Pvt) Ltd v Grindsberg Investment (Pvt) Ltd* 2015 (2) ZLR 477 at 479-480 MAFUSIRE J had this to say-

“A lien is a right of retention, *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. It does not create a cause of action. It merely affords a defence against the owner’s vindicatory action, *rei vindicatio*. The compensation may be in the agreed amount. If there is no agreement, it constitutes actual expenditure, or the extent to which the owner of the goods may have been unjustly enriched at the expense of the possessor: See *United Building Society v Smookler’s Trustees and Golombick’s Trustees* 1906 TS 623 at 628; *Ford v Reed Bros* 1922 TPD 266; *Anderson & Co v Pienaar & Co* 1922 TPD 435; *Brooklyn House Furnishers (Pvt) Ltd v Knoetze and Sons* 1970 (3) SA 264 (AD) at 270E-F and *Syfrets Participation Bond Managers Ltd v Estate and Co-op Wine Distributors (Pvt) Ltd* 1989 (1) SA 106 (W) at 109 H-J.

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: See PJ Badenhorst, JM Pienaar and H Mostert Silberberg and Schoeman’s *The Law of Property* (5th ed), Lexis Nexis Butterworths, Durban, 2006) at pp 412-415. The possessor is entitled to be compensated for the necessary costs he incurs in, among other things, preserving the owner’s property- *Brooklyn House Furnishers (Pvt) Ltd* (supra). This is type of a lien is a personal right.”

I totally agree with MAFUSIRE J’s definition and purpose of a lien.

In the present case the respondents are claiming a lien over owing storage costs of \$ 49 038.00 that arose from the bonding of forty three vehicles. That amount does not refer to the two vehicles in question alone. To make matters worse is the fact that while the bonding costs are to be paid by the applicant, the vehicles that have been retained by the respondents do not belong to the applicant but a third party, that is the Government of Zimbabwe which is not privy to the contract between the applicant and the respondents. The respondents, in my view cannot exercise a lien over property of third parties. The two motor vehicles are not owned by the applicant but by the Government of Zimbabwe. The applicant is a mere agent through which the said vehicles were being imported and cleared into Zimbabwe. The respondents can only exercise a lien over the applicant’s property. The defence of lien is therefore not available to the respondents.

In the result it is ordered that-

1. The 1st and 2nd respondents or any of their agents and or employees, or anyone acting on their behalf or on his own are ordered to release and restore possession into the applicant and or its agents or employees' custody within two (2) days of this order failure which the Sheriff of the High Court is hereby ordered and directed to do all things possible to restore possession and cause release into applicant or its agents or, its employees' custody and possession of the following motor vehicles:-
 - a) 1x Toyota Hilux Revo 2.8L 4X4 6Speed Automatic Double Cab, New Generation (Chassis Number MROBA3CDX00101439), Engine No. 1GD-0017855) and;
 - b) 1xToyota Hilux Revo 2.8L 4X4 6Speed Automatic Double Cab, New Generation (Chassis No. MROBA3CDX00002488) Engine No. 1GD-0010383).
2. The respondents are interdicted and restrained from interfering in any way with the applicant's activities regarding the two (2) motor vehicles mentioned in para (1) above without any order of the court.
3. Costs of suit on a legal practitioner and client-scale shall be borne by the respondents jointly and severally the one paying for the other to be absolved.

Mawadze and Mujaya, applicant's legal practitioners
Coghlan, Welsh and Guests, 1st and 2nd respondents' legal practitioners