

ALEXIOS CHIGAAZIRA
versus
SHAKE MUSEVE
and
LAURA MUKWEKWE
and
RAPHAEL GABRIEL

HIGH COURT OF ZIMBABWE
DUBE J
HARARE, 2 March 2017 & 6 April 2017

Opposed matter

S. Ncube , for the applicant
S. Mushonga, for the 1st & 2nd respondents

DUBE J: The applicant brings an application to compel the return of his biscuit making equipment which is in the possession of the first and second respondents.

The applicant's case is based on the following facts. He owns the biscuit making equipment. The applicant was in the business of biscuit making with third respondent. When production was shelved for a while in February 2016, third respondent offered to store it at an acquaintance's, namely second respondent. He understood that the storage was going to be free of charge. The first respondent is the owner of the premises where the equipment is being kept. He was unaware of the rental arrangement. When the applicant asked for his equipment, from second respondent, he was advised that she was also renting the space the equipment was stored in from first respondent and that he owed first respondent rentals for the storage. She asked him to pay rentals for the storage of the equipment to first respondent for the period the equipment was stored at the premises. The first respondent has refused to hand over the equipment. The applicant contends that he is not privy to the lease agreement entered into between first and second respondents and no lien applies to him. The claim for arrear rentals should be made against third respondent. He brings a claim for vindication of the equipment.

The second respondent submitted as follows. There is no evidence that the applicant is the owner of the property in dispute. In February 2016, third respondent requested her to keep the equipment and he would come and collect it later. The whole complex where the equipment is stored belongs to the first respondent. The complex is divided into several bays which first respondent leases out. She leases bay No 2. The equipment is stored in that bay. She subleased part of bay no 2 which she leased from first respondent to him at a rental. Storage fees were agreed to and applicant was later made aware of the fees. Applicant gave his permission to third respondent to store the property at her bay. She is owed arrear rentals and hence has a landlord's lien over the equipment. She has a right to possession by virtue of a verbal sublease agreement she entered into with third respondent which agreement still subsists. She is owed arrears of \$2700-00. The equipment continues to accrue holding over damages. Applicant may not remove her equipment from bay no. 2 until she pays arrear rentals owing to first respondent. She is not using the equipment as it is obsolete and she has no use for the equipment. The first respondent submitted that he is not aware of the arrangement between second and third respondent concerning the equipment and how it came to be on the premises. He wants the first respondent to pay arrear rentals outstanding. Third defendant was barred.

It is common cause that the third defendant took the equipment for storage with second defendant who leases the premises. The dispute is over the arrangement involving the storage of the equipment and whether applicant is entitled to demand possession of the equipment from respondents.

An owner of property is entitled to vindicate his property from whoever possesses it without his consent see *Chetty v Naidoo* 1971 (3) SA 13. In *Stanbic Finance Zimbabwe v Chivhunga* 1999 (1) ZLR 262 the court dealt with the subject of onus in a *rei vindicatory* action and remarked as follows,

“The owner may claim his property whatever found from whosoever is holding it is inherent in the nature of ownership that possession of the rei should normally be with the owner and it follows that no other person may withhold it from the owner, in instituting a rei vindication he need therefore do no more than allege and prove that he is the owner and that the defendant is holding the res”

An applicant who seeks to vindicate his property should prove the following,

- a) he is the owner of the property
- b) that the property is in the possession of another person.
- c) and see that he possesses it without his consent.

An owner of property has exclusive rights to the property. He has a right to reclaim his property from any person who wrongfully withholds it.

Once an applicant has proved the requirements of a *rei vindicatio*, the onus shifts onto the respondent to justify his right of retention. The first respondent relies on a lease agreement entered between her and third respondent to continue holding onto the equipment. She contends that she has a landlord's lien against applicant's property. The case of *Oakland Nominees Ltd v Gelria Mining and Investment Co Ltd* 1976 (1) SA @ 452 recognises that a possessor may have enforceable rights against an owner. The court remarked as follows,

"Our law jealously protects the rights and 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 that is tangible through an existing or past relationships"

Silberberg and Schoeman's *The Law of Property*, Fifth Edition defines a landlord's lien on p 436 as follows,

"Primarily the hypothec covers things carried and brought onto the property leased by the tenant (*invecta et illata*) that are owned by the tenant, including cash. However, in certain circumstances it also extends to goods and articles owned by the third parties. Thus, the things carried in and brought onto the property leased by a sub-lease are subject to the head-lessor's hypothec to the extent to which he or she owes rent to the lessee as his or her sub lessor."

As regards property of a third party, *Silberberg and Schoeman* on p 436 states that the lien extends to property owned by third parties and remarks that "...the things carried in and brought onto the property leased by a sub-lessee are subject to the head-lessor's hypothec to the extent to which he or she owes rent to the lessee as his or her sub lessor", See *Sugarman and SA Breweries Ltd v Burrows* 1916 WLD 73.

The case of *Bloemfontein Municipality v Jackson* 1929 AD 266, deals with a scenario where property of a third party is brought onto the leased premises by the tenant and is available to the tenant. The court held that a third party whose movables are brought in by the tenant are covered by the hypothec where they are brought in with the knowledge and consent of the owner, with the intent that the goods be used by the tenant and the lessor is unaware that the goods belong to a third party. The owner will be taken to have consented to the goods being subject to the landlord's hypothec. In the latter case of *Eight Kaya Sands v Valley Irrigation Equipment* 2003 (2) SA 495, the court held that property belonging to a third party found on the leased property which is available to the tenant, who creates the impression that the goods belong to the tenant exposes those goods to the landlord's tacit hypothec and that where property belonging to a third party is attached, the goods must be released when that ownership has come to the landlord's knowledge.

The case of *TR Services (Pty) Ltd v Polynton's Corner Ltd* 1961 (1) SA 773 (D) lays out the requirements of the hypothec where a third party is involved as follows,

- a) the goods must be on the premises with the knowledge of the owner of the goods.
- b) there must be a degree of permanence.
- c) The property must be there for the use of the tenant and
- d) the landlord must have had no notice that they belonged to some third party.

The case of *Brooklyn House Furnishers v Kneetze and Sons* 1970 (3) SA 264 deals with an enrichment lien. It is authority for the proposition that a lien can be regarded as a defence against an owner's *res vindicatio* until the owner has satisfied his debts to the lien holder. The retainer must have a claim against the owner.

A landlord has a right at common law to possess a tenant's property where a tenant fails to pay rentals. This is possible under a landlord's lien or lessor's tacit hypothec as it is otherwise known. The law allows a landlord to withhold personal property of a tenant brought onto the leased premises by the tenant, for failure to pay rentals to safeguard payment of his rentals. The lien accrues as soon as the rentals become due and attaches to property belonging to a lessee found on the leased premises when rent is due. The landlord may hold onto the property until the arrear rentals are paid. The landlord is entitled to take the property and sell it to recover his rentals. Where he decides to dispose of the property to recover the debt, he is required to follow proper legal channels. Generally, the hypothec covers goods brought onto the leased premises by the tenant for rentals that are owned by the tenant. The property must be on the premises of the tenant. Property outside the premises may not be taken.

A sub-lessees' property is subject to the landlord's hypothec where he fails to pay rentals. The landlord's hypothec extends to property belonging to a third party brought onto the leased premises by the tenant on the basis of implied consent or estoppel. AJ Van Der Walt in an article titled, *Extending the lessor's tacit hypothec to third parties' property* states that the reasoning for this approach is that such a third party and owner having been aware of the whereabouts of his property, fails to protect it from the landlord's lien by informing the landlord of his rights in the property and hence is subjected to the lien. Property that is brought for use by the tenant and with the knowledge and consent of the owner and where the goods have been on the premises for an indefinite period and are intended for permanent use by the tenant are attachable. Where the goods are taken to the premises for use by the tenant and the landlord is unaware that the property belongs to a third

party, the goods are covered by a lien. The basis of the lien being capable of being a defence to a *rei vindicatio* is based on implied consent of the owner and estoppel.

The law governing the applicability of a lien, more so the requirements of a lien are clear that they relate to a claim for a lien by a landlord. A tenant who sub leases the premises may not rely on the landlord's lien, he is not the landlord. It is only the landlord who may rely on a landlord's tacit hypothec. The landlord's lien raises constitutional concerns. The extension of the lien to third parties is unfair when one considers that there may be no privity of contract between the third party and the landlord. The lien violates an owner's right to property in that an owner is deprived of his property in circumstances where he is not a party to any lease agreement and has no contractual relationship with the landlord. As regards the lien generally, the law allows the property of a tenant to be seized without notice or hearing in violation of principles governing due process of law. This amounts to an unlawful taking of property. The landlord is afforded immediate relief whilst the tenant's recourse is to take the rent dispute for resolution at court. The practice allows self-help on the part of the landlord, thereby protecting only the interests of the landlord. The practice is discriminatory.

The applicant has managed to show that he is the owner of the biscuit making equipment. He produced receipts to that effect, illustrating on a balance of probabilities that he owns the property. The equipment is in the possession of another person who possesses it without his consent. The respondents were in possession of the equipment when these proceedings were instituted. The applicant has satisfied the requirements of a *rei vindicatio*. The onus shifts into the respondents to show that they have a right of retention over the equipment.

The applicant's version that the equipment was to be stored for free is more probable. I see no reason why third respondent would want to enter into a lease agreement for property not belonging to him and when the partnership had dissolved. There is no reason why the third respondent would enter into the lease agreement himself, in his name when the applicant was available and in the absence of any authority to do so. What was his benefit? The indications are that he stored the equipment for free and is conniving with the second respondent and the sublease is a sham. Even if it is accepted that there was a sublease agreement between second and third respondents, there is no privity of contract between the owner of the equipment and these respondents. There is nothing to support the allegation that third respondent was an agent of the applicant. The applicant was not involved in the arrangements for storage and he says he was unaware that he was required to pay for the

storage. The third respondent entered into the lease agreement he must bear the consequences of failing to pay the rentals.

The defence of the respondents is not based on an enrichment claim. The claim is for a landlord's lien. First respondent seeks to rely on a landlord's lien as a defence. The first respondent is not a landlord. The landlord, is not claiming any lien against applicant. He has distanced himself from the claim of a landlord's lien and says that he simply wants his rental from second respondent. He is frustrated that the applicant has cited him in these proceedings. What complicates this matter is that applicant is not a party to the sub-lease. A landlord's hypothec is simply that. It is a right exercisable by a landlord alone . A lessee who sublets a property may not, upon failure of the sub-lessee to pay rentals, have a lien over the sub-lessee's property. Equipment brought onto leased property by a sub-lessee is subject to the head- lessor's hypothec where he owes rentals to the lessee who is his sub -lessor. The sub- lessor himself has no hypothec against the equipment.

The facts do not support a defence of a lien against a third party. Firstly on the basis that the lien is not claimable by the first respondent. Secondly, whilst the equipment was brought in with the knowledge and consent of the owner, the respondents have not managed to show that the equipment was brought by the owner and for use either by the tenant or third respondent. Further the respondents have not shown that the equipment has remained there for an indefinite period constituting a sufficient degree of permanence to subject the equipment to a landlord's lien. The sublease was a monthly agreement. The equipment was brought in February 2016. By July 2016 applicant was already demanding his property. There is no degree of permanence about the equipment. There is no legal relationship between the applicant and the second or first respondent. There is no creditor debtor relationship between the parties . Whilst the storage was sought for purposes of storing applicant's equipment , there is no legal justification why the equipment should serve as security for the debt of the third respondent. There is no landlord's lien that binds the owner . First respondent's recourse lies with the person with whom she has a lease agreement.

The respondents have failed to prove a right of retention of the equipment. The applicant is entitled to vindicate his property. The first respondent lays no claim against applicant. There is no basis for an order of costs against him.

In the result it is ordered as follows:

1. The 1st respondent shall return the biscuit making equipment being:
 - (a) Biscuit making machine with 50kg per hour capacity

- (b) Dough mixer 50kg capacity
- (c) Dough mixer 30kg capacity
- (d) Dough mixer 10kg capacity
- (e) Wafer baking tongs (6)
- (f) Horizontal line auto packing machine
- (g) Water packaging (Bopp)

To the applicant within seven days of the granting of this order.

2. First respondent shall pay costs of suit

Donsa Nkomo and Mutangi Legal Practice, applicant's legal practitioners
Mushonga Mutswairo & Associates, 1st and 2nd respondents' legal practitioners