

DEVEN ENGINEERING (PVT) LTD
versus
JAMES CHIYANGWA
and
THE OFFICER-IN-CHARGE, SOUTHERTON
POLICE STATION
and
THE COMMISSIONER OF POLICE
and
THE MINISTER OF HOME AFFAIRS
and
THE ACTING PUBLIC PROSECUTOR

HIGH COURT OF ZIMBABWE
BHUNU J
HARARE, 12 and 24 January 2007

Urgent Chamber Application

Mr *Fitches*, for the applicant
Mr *Mlotshwa*, for the 1st respondent
Mrs *Gijima*, for the 4th respondent

BHUNU J: In this application there is no material dispute of facts. The undisputed facts are that the applicant is an engineering company whereas the 1st respondent is a bus operator carrying on business under the style of Jimmy Jimalo Luxury Tours.

Sometime in or around August 2006 the parties concluded a contract of service wherein the applicant agreed to refurbish the 1st respondent's bus being a DAF registration number 492-553L for a fee.

Upon completion of the work there was a dispute as to the exact amount payable for the work done in consequence whereof the applicant held on to the bus thereby exercising its workman's hypothec or lien. It is accepted by all the parties concerned with the exception of the 4th respondent, the Acting Public Prosecutor in-charge of Mbare that, the applicant was entitled to exercise its workman's hypothec and hold on to the bus as security until it had been paid.

Aggrieved by the applicant's refusal to release the bus the 1st respondent made a report at Southerton Police Station.

The police correctly in my view took the opinion that this was purely a civil dispute which had nothing to do with them but just to be sure they consulted the 5th respondent.

The 5th respondent in great haste determined that the applicant and its directors were guilty of attempted extortion. She then ordered the police to confiscate the bus under the pretext that she wanted the bus as an exhibit. She however inexplicably later ordered the police to release the bus to the 1st respondent thereby effectively depriving the applicant of its lien.

The matter was put in its correct perspective at the hearing by Superintendent Nzombe whom I must commend for being honest and candid with this court. In his own words this is what he had to say:-

"The investigating officer in his own opinion thought that the dispute was purely civil, so he took the matter to the public prosecutor at the magistrates' court. There he was instructed to charge the applicant with attempted extortion and to take possession of the bus.

The decision to take possession of the bus was that of the public prosecutor, and not the police. There were written instructions from the public prosecutor that the police should actually remove the bus from the applicant to Southerton Police Station. So the police went and removed the bus. The removal of the bus was done with the consent of Deven Engineering.

The 1st respondent later made an affidavit claiming the bus. We contacted the public prosecutor who gave another instruction to release the bus to the 1st respondent. It was not our decision as the police to release the bus to the 1st respondent. The police acted reasonably, that is why we are not opposing this application."

I am in total agreement with Superintendent Nzombe, and the police must be commended for the fair and just manner in which they

handled the matter but for the public prosecutor's rather unbecoming conduct.

The public prosecutor's ignorance and failure to recognise and appreciate that this was essentially a civil dispute where the applicant was entitled to retain the bus as a workman's lien or hypothec is indeed amazing if not frightening.

The mere fact that the prosecution is *dominus litis* in respect of criminal trials does not in my view give a public prosecutor the right to negate and ride rough shod over other people's civil rights with reckless abandon and impunity.

It is trite that in our law the courts lean in favour of preserving existing rights rather than deprivation of such rights. Thus once it was accepted by everyone concerned except the public prosecutor who had no business meddling in purely civil matters that the applicant was entitled to a workmen's hypothec or lien, the public prosecutor ought to have proceeded with extreme caution before depriving the applicant of its existing rights.

While the public prosecutor may have been entitled to prosecute she was certainly not entitled to order the release of the disputed bus to the 1st respondent with the full knowledge that the 1st respondent was not disputing that the applicant had a valid lien over the bus in question. By her conduct in this respect she was in my view clearly usurping the functions of the civil courts if not abusing her prosecution powers.

Where possession of an exhibit is the subject of a civil dispute the prosecutor or the police have no business ordering the release of the disputed property to one or other of the disputants. That function should be left to the courts which should make a judicious decision after hearing both parties.

In this case the police acted properly. They were unwilling to release the bus to the 1st respondent. They therefore referred him to the public prosecutor. The prosecutor however misled them into the wilderness of illegality by ordering the release of the bus to the 1st respondent.

When it dawned upon her in my Chambers that her conduct was irregular the public prosecutor began to deny that she had ordered the police to release the bus to the 1st respondent. Superintendent Nzombe to his credit was able to confront her with her written instructions whereupon she made an about turn and said that the police exercised their discretion through her instruction to release the bus to the 1st respondent.

When I asked her why she ordered the release of the bus in the face of an undisputed valid lien, her response was that she was concerned that the 1st respondent was losing profit from the bus and that there was no prejudice to the applicant. She was therefore deliberately defeating the whole purpose for which a lien is meant. She was however unable to explain what would have happened in the event of the bus getting destroyed or the 1st respondent disposing of it.

A lien is meant to arm twist a bad debtor into paying for work done or services rendered. Every Tom and Dick knows pretty well that if you do not pay the cobbler you do not get your repaired shoe back and that the prosecutor has no business ordering the release of the shoe without payment. The position cannot and is not different from a bus or any other property.

The 5th respondent's conduct and decorum in the handling of this matter does not augur well with the due administration of justice in this country. It undoubtedly kills both local and foreign investor confidence. No sane investor will be interested to invest in a legal system where if he holds onto a valid lien he will be persecuted and

have the lien wrestled away from him and given to the customer by State officials without the due process of law. At the hearing we were informed that the applicant's other customers were now lining up demanding the release of their vehicles without first paying for services rendered.

Fortunately I am certain that this is not the law in our country. Our law recognises and protects the retention of property as workman's lien. Zimbabwean law does not penalize or punish anyone for the application of legitimate force or pressure. It is only illegitimate force or pressure which constitute extortion. This is a matter of elementary law.

As I have already indicated elsewhere in this judgment the 1st respondent acknowledges the existence of a valid lien but argues that since the applicant has already lost the lien it can now only sue for the recovery of the amount owed. It was argued that the applicant voluntarily surrendered its lien and that the police lawfully dispossessed the applicant of its bus in terms of section 49 of the Criminal Procedure and Evidence Act [*Chapter 9:07*] which provides as follows:-

- “49. The State may, in accordance with this part seize any article
- (a) which is concerned in or is on reasonable grounds believed to be concerned in the commission or suspected commission of an offence, whether within or elsewhere; or
 - (b) which is on reasonable grounds believed may afford evidence of the commission or suspected commission of an offence whether within or elsewhere.”

It was further argued that the applicant consented to the search and seizure of the property by the police without a warrant in terms of section 51 of the Act which reads:-

- “1. A police officer may, without warrant, search any person or container or premises for the purposes of seizing any article referred to in section forty-nine and additionally, or alternatively seize such article -
(a) if the person concerned consents to the search for, or alternatively, the seizure of the article in question or if a person who may consent to the search of the container or premises consents to such search and additionally or alternatively, the seizure of the article in question; or

It was then contended by both the 1st and 5th respondents that the police acted lawfully in seizing the bus. I find no merit in that argument because the police were seizing the bus in circumstances where they did not believe that it had been used in the commission or suspected commission of any offence. The police’s opinion was that this was purely a civil matter which did not warrant invoking the above provisions of law the 1st respondent having acknowledged that the applicant had a valid lien over the bus.

The 1st respondent placed heavy reliance on the case of *Orbit Motors (Pty) Ltd vs Reeds (Cape) Ltd* 1975 (2) SA 333 whereas the applicant relied heavily on *Assurity Motors (Pvt) Ltd vs Truck Sales (Pvt) Ltd* 1960 (SA) 686 (SA).

Both cases concerned motor vehicles purchased on hire purchases. The purchasers sent the motor vehicles for repair but failed to pay for the repairs and hire purchase instalments. Both sellers obtained writs of execution against the respective buyers.

When the messenger of court went to execute the second garage asserted its lien but succumbed to superior force and authority whereas the first garage voluntarily relinquished possession without first asserting its right of lien over the vehicle.

In the second case the court restored the lien observing that as the garage had not voluntarily relinquished possession it was entitled to restoration of the lien.

In the first case the court held that as the garage had voluntarily lost possession of the lien it had irrevocably waived its right.

The crux of the matter is therefore whether or not the applicant voluntarily lost possession of its lien over the bus in question.

Both cases make the same point to the effect that a voluntary handover takes place when the person handing over or waiving his right to a lien enjoys a free choice either to handover or not to do so. See *Page vs Public Trustee* 1926 CHD 842 at p 852.

They both held that where force, fraud or undue means are used, the lien holder's lien will be restored.

In this case the applicant stated without any contradiction in paragraphs 14 to 16 of his founding affidavit that he asserted his right to a lien over the bus but was threatened with arrest and detention by Sergeant Mbusa of Southerton Police Station. It is therefore an established fact that the applicant did not voluntarily waive or give up his possession of the lien. He is therefore entitled to restoration of that right because he merely succumbed to irresistible superior force. There was nothing he could do. He was put between a rock and a hard place. He had to give up possession or risk police detention. He was powerless, one cannot be expected to wage a successful battle against the police.

In the circumstances the applicant did the only sensible thing to give up possession and come to court to seek lawful restoration of its lien.

As regards costs nothing much need be said as I have already voiced my concern at the unbecoming conduct of the public prosecutor at the behest of the 1st respondent. It is clear that the 1st respondent

was using the public prosecutor's office as a vehicle for unlawfully wresting the bus from the applicant. Whatever the public prosecutor did she did it for the benefit of the 1st respondent. She was not acting as a neutral official of the State.

The general rule is that costs follow the event. See *Mafukidze v Mafukidze* H-H-279-84 and *Greenspan Brothers (Pvt) Ltd v Commissioner of Taxes* 1960 (1) SA 454. There being no special circumstances nor reason to depart from the general rule I intend to apply the general rule. Having regard to the 1st respondent's reprehensible conduct in his recourse to the criminal law to solve what is purely a civil dispute the court can only voice its displeasure by an award of punitive costs at the higher scale. This must necessarily serve as a warning against the abuse of the criminal justice system and state machinery to settle personal scores. For that reason I have also directed the Registrar to serve copies of this judgment on the Attorney General and the Police Commissioner. I trust that both officials will take appropriate action to restore public confidence in the preservation and enjoyment of the right to hold a lawful lien without State interference in our legal system. Care must be taken to ensure that those who wield State power do not unnecessarily tarnish the country's good reputation.

A provisional order is accordingly granted in the following terms:-

FINAL RELIEF SOUGHT

1. That the applicant should keep the bus being a DAF 825 with registration number 492-553L at its premises until satisfaction of its account.
2. That the respondents should pay the costs of this application jointly and severally the one paying the other to be absolved.

INTERIM RELIEF GRANTED

1. The second respondent be and is hereby ordered to return the DAF 825 bus with registration number 492-553L to the applicant's premises before the expiry of 24 hours after the service of this order.
2. The first respondent be and is hereby ordered to pay the cost of removing the bus from Southerton Police Station or from wherever it may be found to the applicant's premises and to return the keys to the bus to the applicant before the expiry of 24 hours after service of this order.
3. The first respondent is ordered to pay applicant's costs at legal practitioner and client scale.
4. The Registrar is directed to serve copies of this order on the Attorney General and Police Commissioner respectively to ensure compliance with this order.

SERVICE OF PROVISIONAL ORDER

The applicant's legal practitioners be and are hereby given leave to serve this order upon the respondents' legal practitioners.

Honey & Blankenberg, the applicant's legal practitioners
Antonio & Associates, the 1st respondent's legal practitioners

Attorney-General's Office Civil Division, the 4th & 5th respondent's legal practitioners