BAK STORAGE (PRIVATE)LIMITED
versus
GRINDSBERG INVESTMENT (PRIVATE)LIMITED

HIGH COURT OF ZIMBABWE
MAFUSIRE J
HARARE, 19 February 2015 & 28 October 2015

Special case

T. Zhuwarara, for the plaintiff
J. Samukange, for the defendant

MAFUSIRE J: There was a principal claim in respect of which this matter was referred to trial. In court, and at the commencement of the proceedings, the parties settled that claim. They filed a Deed of Settlement. Unfortunately, that did not conclude the matter. There was a residual aspect. It was agreed to proceed with that as a special case. In respect of it, the parties would, among other things, file a statement of agreed facts and heads of argument. Thereafter, I would determine the matter on the papers, or issue a directive on the way forward, if it was not possible to conclude it on the papers. Regrettably, the record was returned to the registry soon after that arrangement. The matter was all but forgotten until about five months later when the plaintiff started making enquiries. That accounts for the delay in delivering this judgment on the special case.

The details of the case were these. Initially the plaintiff claimed US$174 932 said to be the balance of handling charges, warehousing costs and storage fees in respect of certain goods belonging to the defendant, mainly bulk sugar, rice, cooking oil and soya meal.

In its plea the defendant, in essence, confessed and avoided. The contract between the parties was admitted. That the defendant had carried out some of the services was also admitted, albeit tacitly. But the quantum was vigorously contested. The defendant averred, among other things, that it had paid for all such services as the plaintiff had actually carried out on its behalf.

In its replication the plaintiff disputed the defendant's averments and stuck to its original claim. Subsequently, just before the pre-trial conference, the plaintiff amended its

claim to add an additional claim for further storage fees at the rate of U$S20 000 per month from April 2014 to the date when the defendant's goods would clear the defendant's warehouse.

The defendant did not plead to the plaintiff's amended claim. At the pre-trial conference, the plaintiff's amendment was allowed by consent. The issues for trial were listed as follows:

- whether or not the Defendant is liable to the Plaintiff in the sum of US$174 932.00 or any amount;
- whether or not the Plaintiff is entitled to charge damages for goods that it is holding as [a] lien and if so what amount is it entitled to recover from the defendant?

After that the matter was set down for trial. As said already, the parties settled the first issue. The plaintiff's principal claim had reduced to only U$S43 570. The deed of settlement was essentially a payment plan by the defendant to discharge this amount. The deed was also an agreement by the plaintiff to release, in stages, certain of the defendant's goods still held in storage. The parties further agreed as follows:

> "A further 389.5 tonnes [of brown sugar] shall be held as security for Plaintiff's claim for damages under HC 4472/14 pending a determination by the judge."

HC4472/14 is, of course, this case.

The parties went on to file a statement of agreed facts and heads of argument for and against the claim for $20 000 per month. In the statement of agreed facts, the parties acknowledged that the plaintiff had been storing defendant's goods from January 2013 to 12 February 2015. Undoubtedly, 12 February 2015 was specifically mentioned because that was the date of the deed of settlement. The statement of agreed facts went on to record that since 25 April 2014 the plaintiff had been holding the defendant's goods pending payment of the outstanding storage charges. It was also recorded that:

> "Plaintiff is claiming USD 20 000 a month from 25 April 2014 as damages, being storage charges and other expenses incurred by the plaintiff for the goods held in storage. ...."

Finally, the statement of agreed facts had the following statement, which is the

gravamen of the defence, and of the whole case on the residual aspect:

> "The Defendant denies that Plaintiff is entitled at law to charge storage for goods retained as a lien."

Heads of argument filed by the plaintiff seemed to confuse the issue somewhat. They mixed up the right of retention, i.e. a lien, with the right to damages for storage charges. It seems to me that the plaintiff assumed the two to be one and the same thing, perhaps in the circumstances of this case. But they were not.

On the other hand, the defendant has been very clear. Its crisp position has been that the plaintiff was not entitled to claim storage charges for goods that it was holding as a lien because in that situation the goods were being held for the plaintiff's own benefit. That, to me, was the crux of the matter.

In my view, the plaintiff's claim of US$20 000 per month as damages or storage fees for the remaining goods that it had embargoed in its warehouse as a lien was misplaced for a number reasons, not least the fact that it is not the function of a lien to enable a warehouse keeper to found a claim for the commercial charges for storage that he would ordinarily be entitled to on warehousing a customer's goods. A lien is a weapon of defence enabling or entitling the defendant to retain the goods until paid his costs of improvements done on those goods, or his costs for keeping or preserving them. The defendant is entitled to be reimbursed his actual costs, not to charge a profit for retaining the goods.

The plaintiff's claim was also misplaced in that the basis for damages as storage fees at the rate of $20 000 per month was not set out.

I now proceed to deal with these two issues, namely, why the plaintiff could not found a claim for damages or storage fees by reason of its lien, and why I say the rate of claim had no foundation anyway.

[a] **Lien not the foundation for a commercial claim**

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 [Pty] Ltd* v *Knoetze & Sons* 1970 [3] SA 264 [A] at p 270E – F and *Syfrets Participation Bond Managers Ltd* v *Estate & Co-op Wine Distributors [Pty] Ltd* 1989 [1] SA 106, at p 109H – 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 SILBERBERG AND SCHOEMAN'S *The Law of Property*, 5th ed. 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 [Pty] Ltd, supra*. This type of lien is a personal right.

In casu, the plaintiff's lien was undoubtedly a debtor-creditor lien. The plaintiff's original possession of the defendant's goods was through a contract. The law recognises liens for, among others, forwarding agents and warehousemen – *Anderson & Co* v *Pienaar & Co, supra*. Until these service providers are paid their service charges, they have a right to retain the goods in their storage. But when they are paid, the lien then lapses. They must now release the goods.

In the present case, the plaintiff claimed it was not paid for its services rendered to the defendant. The services comprised offloading the defendant's containers, unpacking and warehousing them and managing the stock. The agreement between the parties was that, among other things, the defendant would make payment upon being presented with invoices. The original period in contention was January 2013 to April 2014. The plaintiff claimed a cumulative US$174 932. The defendant disputed the amount and said that the actual services rendered by the plaintiff amounted to no more than US$85 983-94. The defendant said it had paid this amount. Curiously, the plaintiff did not specifically deal with the defendant's contention that the US$85 983-94 had been paid.

The parties did eventually carry out a verification exercise to reconcile the figures and to ascertain what may have been still outstanding by the defendant, if any. They finally came up with the Deed of Settlement. Only US$43 570 was agreed to be due by the defendant. It has not been explained whether or not the plaintiff's original claim, at US$174 932, had been a mistake.

The Deed of Settlement was in February 2015. But from April 2014 the plaintiff had been holding onto to defendant's goods to enforce payment of the original US$174 932. In February 2015, following the settlement, the plaintiff agreed to release portions of the defendant's goods in tranches, dependant on the happening of certain events which were unrelated to the defendant's progress payments. By agreement, a portion of the defendants' goods would remain under retention by the plaintiff pending the determination by this court of the plaintiff's further claim for damages at the rate of US$20 000 per month. The defendant disputed the further claim. The goods remained detained. The claim at US$20 000 per month would continue until the goods were finally released.

The amount that the defendant would pay to the plaintiff under the Deed of Settlement would represent the contract charges due to the plaintiff up to April 2014. In terms of the Deed of Settlement, the defendant would finish paying off in March 2015.

In terms of the law, the plaintiff was in principle entitled to retain possession of the goods still in its custody until March 2015 when it would have been paid in full. When paid, the defendant would then be entitled to the release of its goods. But the plaintiff would be entitled to be reimbursed the actual costs of keeping or preserving those goods from whenever they had come into the plaintiff's warehouse, to whenever they would get out. Those costs would be the necessary storage expenses, if any, directly associated with keeping and preserving the goods. They would hardly be the commercial rates of storage the plaintiff would be entitled to in terms of contract.

The plaintiff's rights to possess the goods as a commercial enterprise in terms of the contract had ceased. The plaintiff's continued possession of those goods was now in the exercise of its lien to force payment of the outstanding contract price. To charge a storage fee of US$20 000 per month as damages is not the function of a lien. A lien holder is not entitled to any storage charges merely for keeping the property on his premises. As a general rule the possession of the goods in the exercise of a lien is only for security reasons and cannot be exploited for commercial purposes: SILBERBERG AND SCHOEMAN, at pp 420 – 421. The

lien holder's claim is confined only to such costs as the owner of the goods would otherwise have incurred himself: see *Ford* v *Reed Bros* and *Anderson & Co* v *Pienaar, supra*, and *Colonial Cabinet Manufacturing Co* v *Wiid* 1927 CPD 198.

In *Wiid's* case, where the buyer of a wardrobe on hire-purchase had stored it with the third party without the consent of the owner, the third party's claim to a lien failed because there had been no actual costs incurred by him in storing the wardrobe. There was no privity of contract between the owner and the third party.

In casu, whilst initially the plaintiff might have had a lien over the defendant's goods, its attempt to exploit that lien for commercial purpose had no legal basis.

[b] **Plaintiff's rate of claim lacks proper foundation**

Apart from the absence of the right to claim, the plaintiff's rate of US$20 000 per month was not set out properly. In the plaintiff's heads of argument was this statement:

> "12. As specified in the statement of agreed facts, the Defendant is in the business of importing food stuffs which by their very nature require to be stored and preserved carefully if they are to be fit for human consumption. Without such storage the food-stuffs would spoil or degrade to the point of no commercial value. Storage is therefore necessary. Such storage cost the plaintiff money as appears from Annexure A to the Statement of Agreed Facts. It is money that the Plaintiff now seeks to recover at the rate of US$20 000 per month from the date of issue of summons till full and final payment."

But Annexure A to the Statement of Agreed facts was merely the Deed of Settlement. It did not say it cost the plaintiff US$20 000 a month to keep the defendant's goods. It did not say what would make up that amount in any event. There has been nothing supporting this claim. The defendant has vehemently disputed it.

Later on, in the same heads of argument, the plaintiff submitted that the floor space taken up by the defendants' goods meant that the plaintiff was unable to accept the goods of other customers and that, therefore, it would be injurious to the plaintiff not to be compensated for the circumstances that had been authored by the defendant itself, i.e. neglecting or refusing to pay the original storage costs and thereby forcing the plaintiff to retain the defendant's goods.

Firstly, as it later on turned out, the defendant was justified in disputing the plaintiff's claim. It put quantum in issue right from the onset. The Deed of Settlement was a huge climb

down by the plaintiff.

Secondly, it is clear that the plaintiff has purported to claim its commercial rates of storage and not merely the actual costs necessary to store or preserve the defendant's goods. I have already ruled against that.

The claim for US$20 000 was unsubstantiated. If it were the only problem, perhaps absolution from the instance would have been the appropriate course. But the whole basis of the plaintiff's claim was fundamentally flawed. In my view, the defendant was entitled to judgment.

In the circumstances the plaintiff's claim is hereby dismissed with costs.

28 October 2015

Gill, Godlonton & Gerrans, plaintiff's legal practitioners
Venturas & Samukange, defendant's legal practitioners