

CITY OF MASVINGO

versus

ZIMBABWE URBAN COUNCIL WORKERS UNION

and

TWO MUZAYA AUCTIONEERS

and

THE SHERIFF OF THE HIGH OF COURT ZIMBABWE

HIGH COURT OF ZIMBABWE

MAFUSIRE J

HARARE, 3 August 2017 & 8 September 2017

Opposed application

Adv T. Magwaliba, with him *Mr C. Kuhuni*, for the applicant

Adv R. Chingwena, for the first respondent

Adv L. Nkomo, for the second respondent

Mr T. Kativhu, for the third respondent

MAFUSIRE J:

- [1] The adjudicating process necessarily involves a certain amount of preconception and prejudice. After going through the pleadings, one formulates an opinion on the strengths and weaknesses of the parties' respective cases.
- [2] In this case, as I walked into court, my first impression was that the applicant's case was unassailable. That view got stronger during submissions by applicant's Counsel. That was until first and second respondents' Counsel opened their mouths. The matter was turned on its head. I was forced to reserve judgment.
- [3] First respondent's Counsel in particular, took everyone by surprise. Some of the points he raised sounded novel. No prior notice about them had been given. I could have stopped him. But unquestionably, they were points of law. They could be raised at any time. Even applicant's Counsel did not object on that score.

- [4] The issue for determination seemed so deceptively simple. It was this. Whose obligation was it to pay the storage costs incurred by the auctioneer, over the judgment debtor's goods that had been entrusted to him by the Sheriff, in pursuance of an attachment in execution of a judgment in favour of the judgment creditor, where that judgment had subsequently been overturned on appeal before the attached goods had been sold? Was it the judgment debtor, the owner of the goods? Was it the judgment creditor, at whose instance the goods had been attached? Was it the Sheriff who, in the first place, had entrusted those goods with the auctioneer? Or should it be the auctioneer himself, who had taken a risk in accepting the goods?
- [5] Such a problem can only arise because of the unsatisfactory peculiarity of our employment laws at the moment. Among other things, the Labour Court, despite it being a court of record with competent jurisdiction in labour and employment matters, has no machinery of its own to enforce its judgments. If they are judgments sounding in money, they have to be registered with this court for enforcement purposes.
- [6] The facts were these. The applicant is a municipal council. The first respondent is a trade union. On behalf of certain of the applicant's employees, the first respondent obtained from an arbitrator an award for arrear salaries. The globular figure was a staggering \$3 571 295-34. The applicant said the amount constituted more than 92% of its budget. It appealed to the Labour Court. But such an appeal does not suspend the judgment appealed against.
- [7] As the appeal was pending before the Labour Court, the first respondent got the arbitral award registered with this court in terms of s 98[14] of the Labour Act, *Cap 28:01*. Sub-section [15] says such registration has the effect of a civil judgment of the court for enforcement purposes.
- [8] I was told the parties had kept fighting. Several facets of the dispute had come before the Labour Court. They had come before this court. They had gone to the Supreme Court, and all the way to the Constitutional Court. But as all that was going on, the first respondent had issued a writ of execution to enforce the award. The third

respondent, the Sheriff, had swooped on council property and attached every conceivable vehicle and machinery. They included graders; bulldozers; front-end loaders; refuse trucks; fire-tenders; a mayoral vehicle; several other vehicles and several other items of machinery.

- [9] The Sheriff entrusted the attached goods with the second respondent, the auctioneer, for safe keeping, pending a sale in execution. The auctioneer said he was renting space for them and employing private security. Daily he was incurring costs, he said.
- [10] Eventually the Labour Court delivered its judgment. It set aside the arbitral award. The applicant demanded its property back. It had been four years and six months since its property had been attached and removed. The Sheriff sent a note to the auctioneer authorising the release of the property. But he directed that all the charges be debited to the applicant.
- [11] The auctioneer said his bill was \$309 944, and that it was rising daily. Until the amount was paid, no goods would be released.
- [12] The applicant felt it had hit a brick wall. It sued for the unconditional release of its goods.
- [13] The applicant's argument, as I understood it, and in my own words, was that it was entitled to an unconditional release of its goods because it had ultimately succeeded in having the arbitral award overturned.
- [14] The applicant also argued that as matters stood, there was no lawful process authorising anybody to keep holding onto its goods and wanting payment for storage. The arbitral award that had morphed into a civil judgment of this court upon registration, had subsequently been overturned. By operation of the law, that civil judgment, and the writ of execution founded upon it, had both become inoperative.

- [15] The applicant further argued that as between itself and the auctioneer, there had been no debtor-creditor lien. It was not the one that had entrusted the goods to the auctioneer. It was the Sheriff. Therefore, it was to the Sheriff, and or the judgment debtor, that the auctioneer should look up to for payment. The auctioneer had not established the elements of a salvage lien that could be enforceable against the world at large as a real right.
- [16] The first respondent's arguments in the notice of opposition and heads of argument were diverse, tenuous and repetitive. It was said, as the judgment creditor in the labour case, the first respondent could not pay because when it had originally caused the goods to be attached, it had done so in legitimate pursuit of a valid and lawful process of execution.
- [17] It was said the first respondent was in the process of appealing against the Labour Court judgment. Its application for leave to appeal to the Supreme Court was said to be pending. As such, the Labour Court's decision was not the last word on the point. The applicant should wait until final determination of the case before it could claim its goods back.
- [18] The first respondent's other argument was that getting it to pay the auctioneers' costs was like punishing it for having caused the attachment of the applicant's goods, yet when that had happened, it had been in legitimate pursuit of a lawful and valid process.
- [19] Yet another argument by the first respondent was that the applicant's application was in the nature of a request for a final interdict. Acres of space, supported by generous case authorities, were then devoted to showing how the applicant had satisfied not a single requirement for such an interdict. These were listed as a clear right; an injury actually committed or reasonably apprehended, and the absence of an alternative remedy.

[20] The first thing Mr *Chingwena* said when he opened his mouth to argue the first respondent's case, was to abide by the heads of argument. These had been compiled by his instructing practitioners. Evidently, he was just going through the motions. He said nothing further in support of them. To me, those heads were nothing more than a pedestrian argument and a pious, self-serving exhortation to be excused from liability.

[21] For example, if the first respondent, in the face of an appeal against the arbitral award that was pending before the Labour Court, had seen it fit to cause the attachment and removal of the applicant's goods, who had been precipitous? At whose risk had that attachment and removal been made? Does Order 40 r 323 of the Rules of this Court not clearly say that one or more writs of execution may be sued out, at his own risk [*my underlining*], by any person in whose favour any judgment has been given, if such judgment has not been satisfied, stayed or suspended?

[22] How could it lie in the first respondent's mouth to say the Labour Court's judgment was not final until confirmed by the Supreme Court, when four and half years earlier the first respondent had treated the arbitrator's award that was under appeal, as final? Not only had it got it registered as a civil judgment of this court, but also it had gone on to execute upon it? Surely, and using the same pedestrian logic, what is good for the goose must also be good for the gander. Was it because the boot was now on the other foot that the first respondent was crying foul?

[23] However, and more importantly, once pronounced, a judgment of the Labour Court is complete in itself. Unless it is on reserved constitutional points, it does not need "confirmation" by any other court before it becomes binding. It may be overturned or upheld on appeal. But that is neither here nor there. This is not a fate peculiar to the judgments of the Labour Court only. Even judgments of this court can be upheld or overturned on appeal. But no one says until the appeal court has made a pronouncement, such judgments are not final.

[24] Somewhere in the first respondent's heads of argument was this statement, which incidentally appeared more than once:

“Furthermore, 1st respondent submits that while the law is very clear that an appeal to the Labour Court against an award does not suspend the operation of the award, the same is not clear as to the status of a judgment which is subject of an application for leave to appeal to the Supreme Court therefore it is disputed that Applicant is entitled to unconditional release of its listed property.”

- [25] That such an argument survived up to the time of the hearing, to be part of what Counsel was abiding by, was, with all due respect, culpable remissness because, more than a week before the date of set down, after I had gone through the papers and had noticed some gaps in the parties’ arguments, I caused, through the Registrar, that the case of, among others, *Makarudze & Anor v Bungu & Ors*¹, be brought to their attention.
- [26] The clear *ratio decidendi* of my judgment in that case was that from both the common law and statute, an appeal from the Labour Court to the Supreme Court, much less a mere application for leave to appeal, does not suspend the judgment appealed against, or intended to be appealed against.
- [27] The argument about final interdicts; clear rights; harm perceived or actually suffered; the absence of an alternative remedy; etc., was manifestly misconceived. Of course every order of court, in the broad sense, is some kind of interdict. An interdict is an injunction. It is a remedy by a court, either prohibiting somebody from doing something [prohibitory interdict], or ordering him to do or carry out a certain act [mandatory interdict].
- [28] But *in casu*, the applicants’ case was not about interdicts *per se*. It was more a *rei vindicatio*. This is so because one of the incidents of ownership of a thing is the owner’s entitlement to the exclusive possession of the *res*. The law presumes possession of the thing as being an inherent nature of ownership. Flowing from this, no other person may withhold possession from the owner unless they are vested with some right enforceable against the owner: see Silberberg and Schoeman’s *The Law of Property*, 5th ed., at p 243.

¹ 2015 [1] ZLR 15 [H]

- [29] Otherwise an owner deprived of possession of his property against his will can vindicate it wherever found, and from whomsoever holding it: see *Chetty v Naidoo*².
- [30] So in this case, after the lapse of the arbitral award by reason of the judgment of the Labour Court, the applicant was entitled to get back its property. Except for the issue of the lien, an aspect dealt with below, no one else had the right to keep the applicant off its property.
- [31] Mr *Chingwena* must have realised the futility of the first respondent's argument. He sprang the argument that the applicant could not be absolved of the auctioneer's bill because it had inexplicably failed to utilise the provisions of s 92E[3] of the Labour Act. This section says pending the determination of an appeal to it, the Labour Court may make such interim determination in the matter as the justice of the case requires.
- [32] Mr *Chingwena*'s point was that when the applicant appealed against the arbitral award, it should at the same time have made an interim application to the Labour Court to stay execution. Not having done that, the applicant should "... *come to the party ...*" as far as the auctioneer's costs were concerned.
- [33] The one problem with that argument was that there was simply no factual foundation for it. In other words, there was no information on whether or not the applicant had in fact not made such application, or that if it had made it, it definitely would have succeeded, and thereby avert the execution.
- [34] The other problem with the argument was that even if the applicant did not utilise the provisions of 92E[3] aforesaid, that would not make it responsible for the precipitous conduct of the first respondent in causing the attachment and removal of the applicant's property in the face of an appeal. The arbitral award and its subsequent registration with this court, in spite of the right anyone derives from such registration, remained an inchoate milestone. At that stage the first respondent had only won a

² 1974 [3] SA 13 [A], at p 20B.

battle. The war was still raging on. But the first respondent chose to celebrate and enjoy the spoils of battle, instead of waiting for the spoils of war. The applicant having ultimately won the war, it must retrieve the spoils of battle.

[35] But Mr *Chingwena* was not finished. He mounted another ambush. He said it was incompetent for the applicant to seek the return of its goods when the order of this court registering the arbitral award had not been set aside and was therefore still *extant*. Even the writ was still *extant*. It was premature for the applicant to seek the unconditional release of its goods without first seeking the setting aside of that order and that writ.

[36] But even Mr *Nkomo*, for the auctioneer, who was fighting from the same corner as the first respondent, albeit for different reasons, did not support Mr *Chingwena* on this. Mr *Magwaliba*, for the applicant, firstly dismissed the argument as untenable, but promptly made some sort of oral application for the rescission of the order of this court registering the arbitral award and for the setting aside of the writ of execution. Mr *Chingwena* opposed the application as unprecedented in that it was neither in terms of r 63 nor r 449 of the Rules of this Court.

[37] I should have made short thrift of Mr *Chingwena's* second ambush. When this court registers an arbitral award in terms of s 98 of the Labour Act, it does not adjudicate on the merits of the dispute. Its function is purely administrative. It is solely to render the arbitral award enforceable. Such a function may as well be performed by an administrative functionary like the Registrar. This, in my view, means that if the arbitral award is eventually overturned by the Labour Court, as was done in this case, the civil judgment of this court, and the writ of execution consequent upon it, are left hanging on nothing. They become unenforceable. No consequences can continue to flow from them. For the first respondent to say the auctioneer should continue to hold onto the attached goods in such circumstances, is to continue upholding the judgment and the writ. That cannot be correct.

[38] Therefore, in the circumstances of this case, to insist on having the order of this court registering the arbitral award, and the writ consequent upon it, being set aside first before the applicant could seek the return of its property, was, in my view, asking for form to override substance. There was simply no need for such a step.

[39] Mr *Nkomo*'s lien argument, just about the only forceful argument of the day, was but ill-conceived also. Firstly, all the parties were agreed that the manner the auctioneer had been entrusted with the applicant's goods by the Sheriff did not create a debtor-creditor lien as between the applicant and the auctioneer. Secondly, and this is my view, the elements of an improvement lien were not fulfilled. It is an improvement, or salvage, lien that creates for the holder a real right that is enforceable against all the world.

[40] A lien is basically a right of retention, or *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 affords a defence against the owner's vindicatory action. 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 *Syfre's Participation Bond Managers Ltd v Estate & Co-op Wine Distributors [Pty] Ltd* 1989 [1] SA 106, at p 109H – J.

[41] 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

& Schoeman's, *op cit.*, at pp. 412 – 415, and R.H. Christie *Business Law in Zimbabwe*, Juta & Co Ltd, at pp. 454 - 455. 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 creates a personal right.

- [42] The holder of a salvage lien is like a *negotiorum gestio*. He takes care of another's property without express authority in times of necessity. The basis of the lien in such a situation is the owner's enrichment, not only if the value of his property has increased, but also if such expenditure has prevented a decrease in its value.
- [43] *In casu*, it could not be said sensibly that the applicant would unjustly be enriched if it got back its property after four and half years of storage at the auctioneer's expense. The auctioneer might have been impoverished by paying rent for the goods and paying security. But that did not automatically translate into enrichment of the applicant. On the contrary, as Mr *Magwaliba* argued, the attached goods were movables that deteriorated by reason of non-use. Furthermore, they were predominantly service vehicles whose quarantine for that length of time actually crippled the applicant in the discharge of its duties to the residents of Masvingo.
- [44] It was also argued that if the applicant succeeded in the relief that it sought and the court ordered the unconditional release of its goods just like that, then the auctioneer would be severely prejudiced in that it would lose its lien. The right of retention and therefore the security rendered by it vanish once a lien has been lost. P. Havenga, *et al: General Principles of Commercial Law*, Juta & Co Ltd, at p 232 states:

“A lien is basically a right to retain something. The person claiming the lien must therefore be in possession of the property which is the object of the lien. If he loses possession, he automatically loses his lien.”

See also Christie, *op. cit.*, at pp 455 – 456

- [45] The question is, who is the auctioneer in the whole execution matrix? Plainly, he is the Sheriff's agent. In terms of r 337, where the debtor has not undertaken to produce the attached goods when needed, the Sheriff is authorised and empowered to remove them to some convenient place of security, to be left in charge of some person on behalf of the Sheriff, pending the day of auction [*my underlining*]. Among other things, such person is not to use, let or lend the attached goods, or in any way do anything which decreases their value. The profit from such goods, if any, belongs to him. If he defaults on his obligations, he loses the right to a remuneration.
- [46] Thus, the auctioneer is that person as envisaged by r 337. He could not possibly have had a lien over the applicant's goods, especially in the face of its vindicatory application after its success in the Labour Court. Any prejudice to him that might stem from an order for the unconditional release of the goods would not be the result of any loss of possession *per se*. In my view, that kind of loss is part of the risk envisaged by r 323.
- [47] This judgment does not deal with the rights of the auctioneer vis-à-vis the Sheriff and or the first respondent. No such case was before me. But obviously, an order that in the circumstances of this case the applicant's goods should be released unconditionally does not determine the rights and obligations as between the auctioneer and the Sheriff and or the first respondent.
- [48] Mr *Nkomo* also brought in the interdict argument, or an aspect of it, in another form. Rule 336 provides that if any person whose movable property has been attached, undertakes in writing, together with some sufficient surety, to produce such property on the day appointed for the sale if the judgment remains unsatisfied, then the Sheriff shall leave the property.
- [49] Mr *Nkomo's* point was that all that the applicant could have done on the attachment of its property, even without any cash outlay, would have simply been to give such undertaking and thereby obviate the removal of its goods and the subsequent storage costs. The link between r 336 and an interdict was that it could not be said that the

applicant had no other remedy. It could have availed itself of this avenue. Of course, a claim for an interdict may fail if, among other things, there exists another effective remedy.

[50] But, as in the case of the first respondent, Mr *Nkomo's* interdict argument was doomed. The applicant's case was not for an interdict in the ordinary sense. It was a *rei vindicatio*. The requirements for a *rei vindicatio* are that the applicant is the owner of the property in question; that it is in the unlawful possession of another, and that it is still in existence and clearly identifiable. All these elements exist in the present case. Plainly, the applicant was entitled to its relief.

[51] The applicant sought the costs of the application against the first and second respondents only. It was argued for the second respondent that whatever the outcome, it should not be mulcted in costs.

[52] However, I see no basis for absolving the second respondent from costs when it fought the application to the tilt, but lost. I see no reason for departing from the general rule that costs follow the event.

[53] In the circumstances it is hereby ordered as follows:

- The respondents shall forthwith and unconditionally release, or cause to be released, all the applicant's goods attached and removed in execution by the third respondent, at the instance of the first respondent, and entrusted into the custody of the second respondent, under Case No HC 4001/11, the full list of which appears on Annexure A to the application.
- The costs of this application shall be borne by the first and second respondents, jointly and severally, the one paying the other to be absolved.

8 September 2016

A handwritten signature in black ink, appearing to read 'M. J. J. J.', is positioned above a horizontal line.

Kuhuni & Associates, applicant's legal practitioners

Matsikidze & Mucheche, first respondent's legal practitioners

Dube-Banda, Nzarayapenga & Partners, second respondent's legal practitioners

Kantor & Immerman, third respondent's legal practitioners