CHITUNGWIZA MUNICIPALITY
and
DELATFIN INVESTMENTS (PVT) LTD

HIGH COURT OF ZIMBABWE
MANZUNZU J
HARARE, 12 July, 1, 15 November 2021, 17 January & 11 May 2022.

**Civil Trial**

*A Chimhofu*, for the plaintiff
*J J Chirambwe*, for the defendant

MANZUNZU J

INTRODUCTION

The plaintiff, Chitungwiza Municipality (the Municipality) sued the defendant, Delatfin Investments (Pvt) Ltd (Delatfin) for the return of the following construction equipment;

a) Front end loader : registration number 511-631V (fleet 226)
b) Grader champion : registration number 688-808D (fleet 308)
c) Bull dozer D4 : registration number 395-551W (fleet 183)
d) Bull dozer D7 x R : registration number 688-488F (fleet 288)
e) Bull dozer Slewa D6 : registration number (fleet 363)

In the alternative the Municipality claimed that Delatfin pays the equivalent market value of the equipment. The Municipality abandoned the claim on rentals of the equipment.

Delatfin has claimed the right of lien over the said property. It has counter- claimed for the payment of US$265 640.00 which is all disputed by the plaintiff.

PLAINTIFF'S CASE.

The plaintiff's case as set out in the summons is that the plaintiff and defendant entered into a written agreement on 22 June 2007 wherein the defendant hired the construction equipment, as claimed in the summons, on the following terms;

a) The period of hire was to run from 1 June 2007 to 30 June 2007.
b) An hourly rent was agreed to per each equipment
c) The defendant would repair the equipment and advise the plaintiff of all such repairs
d) The defendant would set off the rent due to the plaintiff against the repair costs.
e) Any balance outstanding would be paid to the plaintiff.
f) In the event of a breach by the defendant, plaintiff shall cancel the agreement and reclaim its equipment.
g) Defendant in that event will forfeit its repair costs and still pay 2 months' rent.

The plaintiff claims that the defendant refused to return the equipment at the expiration of the contract. In February 2008 the defendant billed the plaintiff repair costs to which the plaintiff made part payment to the tune of US$16 000.00

DEFENDANT'S CASE

The defendant admits that there was a written agreement of hire between the parties but on the following terms;

a) That the defendant will repair plaintiff's vehicles, machine plants and equipment
b) That the plaintiff will pay defendant's bills for the repair costs by hiring equipment to the defendant.

The defendant claims it repaired the plaintiff's equipment and raised a bill for US$281 840.00 with only US$16 200.00 being paid by the plaintiff. On the basis of this the defendant has raised a counterclaim and a defence of lien over the equipment.

In its plea to the counter claim the plaintiff alleged the defendant's counter claim has prescribed.

ISSUES

The following are the agreed issues for determination at this trial:

a) Whether or not the defendant's claim has prescribed.
b) In the event that the defendant's claim has not prescribed, whether or not the defendant has a right of lien over the equipment.
c) Whether or not plaintiff is entitled to the return of the equipment or alternatively payment of an equivalent market value of the equipment.

In this judgment I will follow the order of these issues after an outline of the evidence of the witnesses.

EVIDENCE

The plaintiff relied on the evidence of a single witness one Admire Chipunza an audit manager. He confirmed the existence of a contract between the two parties where the defendant was to repair plaintiff's equipment with such repair costs being paid through the defendant hiring the equipment. He referred to the memorandum of understanding for use of earth moving equipment signed by the parties on 22 June 2007 which stipulates the duration of the agreement as 1 June 2007 to 30 June 2007.

The witness said when the agreement expired on 30 June 2007 there was no further agreement entered into by the parties. The defendant was expected to return the equipment to the plaintiff but did not. The witness denied defendant was owed any money by the plaintiff as any repair costs were to be set off against hiring charges. He insisted the defendant was to be paid through hiring services as the plaintiff had no duty to do the actual payment for the repair costs.

The witness was subjected to long cross examination during which he admitted that letters between the parties for 17 and 21 August 2007 suggest the existence of a verbal contract between the parties after the expiration of the written one on 30 June 2007. He was not privy to the agreement as he was not directly involved.

The defendant's first witness was Felix Munyaradzi, the chief executive officer of the defendant. He said the plaintiff's official visited him with a proposal that the defendant provide repair services to its construction equipment. He said he lead a delegation to meet the plaintiff's town engineer, chamber secretary and town clerk at the plaintiff's workshop. While the plaintiff was willing to get their equipment repaired, they said they had no money to pay for

the repairs. The witness said they were then shown a number of broken down equipment from the workshop. When they got back to the offices for further discussions, the witness said he proposed that they do the repair of the equipment and in return use the same equipment to recoup their repair expenses. He agrees that there was an initial agreement for one month of June 2007.

The witness said the terms of the agreement changed in July 2007 because the plaintiff (through its officials, the mayor, the town clerk and director of engineering), said they were in need of the serviced equipment to provide service delivery to its residents. Plaintiff proposed a new contract after July 2007. At the time some of the serviced equipment had already been released to plaintiff. He said there were a number of meetings held between the parties to craft the way forward.

In one of the meetings the witness said they inquired with plaintiff how they were to proceed given plaintiff wanted the return of the serviced equipment. It was at that meeting that plaintiff then undertook to pay defendant's bills for repair costs as a departure from the original agreement. The defendant accepted the new terms. It was on the basis of the new agreement that he wrote a letter on 17 August 2007 asking plaintiff to settle their bill of US$281 840.00 as per the certificate which was attached. The plaintiff responded in a letter of 21 August 2007. The plaintiff only made part payment of US$16 200.00 leaving a balance of US$265 640.00 which forms the basis of the defendant's counter claim.

The defendant serviced more equipment than that which the plaintiff now claims for release. The certificate gives a breakdown of all the equipment which were repaired. The witness confirms the cordial relationship which existed between the parties until some senior officials of the plaintiff got engaged into some corrupt activities. As a result, some of such corrupt officials were arrested, prosecuted, convicted and sentenced by the courts. Delatfin kept on demanding for its money which plaintiff never paid. Defendant treats the current action by the plaintiff as a way of evading payment.

The witness further said they are ready to release plaintiff's equipment soon after payment of their money. The said equipment was repaired and is said to be functional and is held in the exercise of a lien over the same.

The witness was also subjected to long cross examination. He maintained his story that the hiring part of the original agreement was removed.

The defendant's second witness was Darlington Nota the former Mayor of Chitungwiza Municipality. He confirmed the existence of the original written contract between the parties. He said it was through Council resolution that the plaintiff was to pay repair bills raised by the defendant. He said what went wrong was when some corrupt Council official started demanding money from the defendant in order to process payments. He said failure to pay defendant by the plaintiff was a breach of the contract.

He maintained that plaintiff was to pay before defendant could release the equipment.

WHETHER OR NOT THE DEFENDANT'S CLAIM HAS PRESCRIBED

A debt such as the one claimed by the defendant, according to section 15 of the Prescription Act, Chapter 8:11 prescribes after 3 years from the date when it was due. The defendant's counter claim is for the recovery of a debt an amount of US$265 640.00 which became due on 17 August 2007. This is the date when the defendant presented its bill to the

plaintiff under cover of the letter of even date. The bill, according to the letter, was due upon presentation of the certificate. Prescription began to run on that day.

One may say there was interruption in the running of prescription when the defendant replied the letter of 17 August 2007 on 21 August 2007. The counter claim was filed on 26 October 2015, some 8 years after the debt became due. *Prima facie* the defendant's claim has prescribed unless the defendant shows otherwise.

When the defendant's key witness was asked during cross examination whether he knew the defendant's claim had prescribed, he said all what defendant wanted was its money. When asked why the claim was not brought earlier on, the response was that he considered cordial relationship to be important in business.

I did not hear the defendant say its claim has not prescribed. Instead the defendant's argument is that a counter claim is not even necessary when a lien is raised as a defence. Mr *Chirambwe* for the defendant said in argument that, "It was not even necessary for my instructing counsel to have counter-claimed." But the fact remains there is a counter claim in which the parties agreed at pre-trial conference that the trial court determines the issue of prescription.

There is no doubt that the defendant's claim has prescribed. Having resolved the first issue, the parties agree that the court must then deal with the issue; "In the event that the defendant's claim has not prescribed, whether or not the defendant has a right of lien over the equipment." The issue is clear. The court should only proceed to determine, whether or not the defendant has a right of lien over the equipment, in the event the defendant's claim has not prescribed. Where the claim has prescribed, it means that is the end of the road for the defendant. This is much so because the right of lien is dependent upon a valid claim by the defendant against the plaintiff. A lien cannot be claimed in abstract. There is no leg upon which a lien can stand. This disposes the second issue.

WHETHER PLAINTIFF IS ENTITLED TO THE RETURN OF THE EQUIPMENT

The plaintiff's claim is one of *rei vindicatio.* In *Chetty* v *Naidoo* 1974 (3) SA 13, the court remarked as follows regarding ownership;

> "The owner may claim his property wherever found, from who-so ever is holding it. 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 unless he is vested with some right enforceable against the owner (e.g. a right of retention or a contractual right). The owner, in instituting a *rei vindicatio,* need, therefore, do no more than allege and prove that he is the owner and that the defendant is holding the res, the onus being on the defendant to allege and establish any right to continue to hold against the owner"

A litigant who brings a *res vindicatio* is required to satisfy the following requirements,

1) that he is the owner of the property
2) that the property is possessed by the possessor
3) he is being deprived of the property without his consent.

Once an owner has proved that he is the owner of the property held by a respondent, the onus shifts onto the possessor to show an entitlement to continue holding onto the property.

As already stated the defendant raised the defence of lien. I agree with the plaintiff that the claim for lien over one's property does not suspend the running of prescription. A creditor cannot hold onto someone's property in perpetuity without instituting proceedings for the recovery of his/her debt. Unfortunately the defendant's claim has prescribed. In the premise the defendant has failed to show an entitlement to continue holding onto the property.

While plaintiff claimed in the alternative the value of the equipment, no evidence was lead to substantiate the value.

As a matter of fashion both parties asked for punitive costs in the event of succeeding in circumstances which do not warrant the same.

DISPOSITION:

1. The defendant be and is hereby ordered to return to the plaintiff forthwith the following equipment:

   1.1 Front end loader : registration number 511-631V (fleet 226)
   1.2 Grader Champion : registration number 688-808D (fleet 308)
   1.3 Bull dozer D4 : registration number 395-551W (fleet 183)
   1.4 Bull dozer D7 x R : registration number 688-488F (fleet 288)
   1.5 Bull dozer Slewa D6: registration number (fleet 363).

2. In the event the defendant fails to comply with paragraph 1 of this order, the defendant is ordered to pay the plaintiff an equivalent market value of the above equipment as maybe agreed to by the parties; failing which, the value shall be assessed by the court upon application by either party.

3. The defendant shall pay costs of suit.

*Matsikidze and Mucheche*, plaintiff's legal practitioners
*Lawman Chimuriwo Attorneys at Law*, defendant's legal practitioners