IN THE HIGH COURT OF SWAZILAND

CIVIL CASE NO. 2780/07

In the matter between

GASPAR AMERICO	**APPLICANT**
VS	
SANDILE THWALA N.O.	**1st RESPONDENT**
	2nd RESPONDENT
REGISTRAR OF DEEDS	

CORAM	**MAMBA J**
FOR APPLICANT	**J. RODRIGUES**
FOR RESPONDENTS	**(NOT SERVED & NO APPEARANCE)**

JUDGEMENT
2nd AUGUST, 2007

[1] The applicant is a businessman of Manzini and runs or operates a panel beating and spray painting business on leased premises owned by the First Respondent. The lease agreement still subsists and he is still in occupation of the fixed property, described or referred to as Lot Number 260, Esselen Street, Manzini.

[2] The applicant alleges that whilst in occupation of the property, he has made useful and necessary fixed improvements on the property in the sum of E196,000.00 for which he has not been compensated and for

which he expects the owner thereof to compensate him. He therefore claims he has a lien over the property. The First Respondent has however, not addressed this issue to the satisfaction of the applicant. The Applicant has communicated to the First Respondent his willingness or desire to purchase the property but the indications are that the First Respondent intends selling the property to someone else. It is this state of affairs or impasse that has driven the applicant to launch this ex parte application seeking *inter alia* for an order:

> "2. That the applicant's improvement lien in the sum of E196,000.00 be and is hereby confirmed.
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> 3. That a Rule Nisi be and is hereby issued confirming the applicant's improvement lien in the sum of E 196,000.00 (One Hundred and ninety six thousand Emalangeni) over immovable property Lot No. 260, Esselen Street, Manzini held under Deed of Transfer No. 23 of 1957.
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> 4. That a Rule Nisi be and is hereby issued interdicting and restraining the Second Respondent from effecting transfer of Lot 260, Esselen Street, Manzini held under Deed of Transfer No. 23 of 1957 pending payment of applicant's claim of E196,000.00." ' ' ' '

[3] This application exhibits a fundamental misunderstanding of the *ius retentionis or detentionis* on the part of the applicant. This right, as its name or real appellation indicates, is a right of retention or detention. It is a right of the lien holder to retain or detain the property of another on which he, the lien-holder has expended money or money's worth for which he has not been compensated. It is a real right and operates against the whole world. It is a right that attaches to and goes with the property irrespective of whether or not ownership thereof has changed hands. If for example, the property is transferred to another person, the new owner takes over the property, subject to or as burdened by the lien.

[4] In the case of UNITED BUILDING SOCIETY v SMOOKLER' S TRUSTEES AND GOLOMBICK'S TRUSTEE, 1906 TS 623 at 630 the court stated the rule as follows:

> "The rule then seems to be that salvage and improvement liens prevail against all the world, but, on the other hand, are limited to expenses which have maintained or advanced the market price; while debtor and creditor liens (so far, at all events, as they include expenses not limited by considerations of market price) are restricted within the limits of contractual privity. ...Now a *ius retentionis for necessariae or utiles impensae* may well be, and we think is, a real right. No doubt it is not possessioning in the legal sense, but it is a right to exclude everyone else from possession during the continuance of a certain state of things. It is therefore a right to exclude the whole world from the enjoyment of one of the most important privileges which accompany dominium"

[5] Again in **COHEN AND COMPANY v LAWTON AND FRANKENBERG,**

1921 SWA 43 at 44, GUTSCHE J stated that:

> "The ius retentionis or lien which the law confers on an artificer who has bestowed labour or expense on an article delivered to him for repair or improvement comes into effect ipso jure and entitles the artificer to retain the article until his just charge is paid.
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> To obtain this right no specific act of the workman - apart from possession; not the possessio civilis, i.e. possessio animo domini, but possessio naturalis, i.e. possessio animo sibi habendi sed absque opinione domini. ..That is, there must be physical control or detentio coupled with the animus sibi habendi or animus possidendi."

[6] The IUS *retentionis* is not a right that may be used to found a basis for interdicting or restraining the owner of property to which a lien obtains or relates, from selling or alienating such property. It is a right or defence against eviction; a weapon of defence rather than offence. On its own and *eo nomine* it is not a cause of action; but unjust enrichment may be used to found an action for compensation in such circumstances.

[7] In **REED BROS v FORD, 1923 TPD 150 - WESSELS JP** referring to Voet and other authors stated that;

> "All that these authorities say is that if I have built upon your land and in fact improved it in value you can not claim the land from me without paying me compensation for the improvements, and if you take the land I can sue you for the value of the improvements or else I can withhold the property from you until you pay me.
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> ...Nowhere do the Roman Dutch Authorities say that the Roman Law in regard to ius retentionis has been so completely changed that whereas in the later system the right was only a weapon of defence it became in the former a weapon of offence. ...Retention differs fundamentally from the actio pignoratitia in so far that it only affords a ground for defence to an action to recover the property retained and that does not as a general rule give a cause of action."

[8] I also pointed out to counsel that apart from the fact that there was nothing on the papers to justify not giving notice of the application to the respondents, confirming the applicant's lien for E196,000-00 would be tantamount to entering judgement in favour of the applicant against the first respondent in that said amount, through the

backdoor and this court could not do that.

[9] For the above reasons, I ruled that the application was hopelessly misconceived and had to be dismissed.