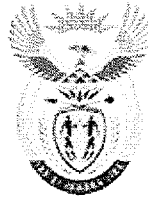



REPUBLIC OF SOUTH AFRICA



IN THE SOUTH GAUTENG HIGH COURT

(JOHANNESBURG)

(1)	REPORTABLE: YES/NO
(2)	OF INTEREST TO OTHER JUDGES: YES/NO
(3)	REVISED.
01 July 2013	
Date	Signature

CASE NO. 13/00731

In the matter between:

SETHABILE SAMUKELISIWE MTHONTI

Applicant

and

**IN-OUT PANELBEATERS CC
T/A PROFESSIONAL PANEL BEATERS**

Respondent

JUDGMENT

WEINER J:

BACKGROUND

- [1] The applicant is the registered owner of a 2011 BMW 320i automatic motor vehicle with registration number BJ 58 XS GP ("the vehicle"). BMW Midrand (a division/associated entity of BMW Financial Services) ("BMW") is reflected as the titleholder of the vehicle ["BMW"]. BMW supports the application.
- [2] The vehicle is insured by the applicant with Virgin Money. This policy was underwritten by Dial Direct Insurance Company Limited ("Dial Direct"/ "the insurance company"). Telesure Group Services (Pty) Limited ("Telesure") administers the insurance policy on behalf of Dial Direct.
- [3] On 4 July 2012, the applicant was involved in a motor vehicle accident. The vehicle was damaged. The applicant lodged a claim with Dial Direct.
- [4] Approximately two weeks later, and while the applicant was waiting for Dial Direct to process her claim, she took the damaged vehicle to the respondent for the purposes of obtaining a quotation for the cost of the repairs.
- [5] The applicant informed the respondent that they should not commence with the repair, until she received the quotation and same was approved by Dial Direct. The vehicle was left with the respondent.
- [6] The Applicant was then advised by Telesure that Dial Direct would not authorise the respondent to do the repairs because it is not an approved BMW service agent/repairer.

- [7] During the first week of August 2012, the applicant went to retrieve her vehicle from the respondent's premises. She was told that the repairs had already been effected.
- [8] The applicant was informed by the Respondent's representatives that they would try and assist her by contacting the insurance company and seeking an assurance from them that they would agree to pay for the costs of the repairs to the vehicle. This would assist the applicant in obtaining the return of the vehicle.
- [9] Several attempts were made to settle the impasse but to no avail. Dial Direct still refused to retrospectively authorise the repairs and the respondent continued to hold possession of the vehicle.
- [10] The applicant appointed her present attorneys of record ("Fluxmans") who, on 3 September 2012, wrote to the respondent and requested the return of the vehicle. Fluxmans also asked the respondent whether it asserted a lien over the vehicle and if so, whether it would be willing to accept, as substitute security, a guarantee from the insurance company. In such event, an invoice was required in order to enable the furnishing of a guarantee.
- [11] On 11 September 2012, the respondent's attorneys of record ["Bouwers"] replied. They advised that the tendered guarantee would be accepted by the respondent as substituted security. They agreed to furnish an invoice setting out the costs of the repair.

- [12] The invoice was not furnished. Accordingly, on 28 September 2012, Fluxmans again requested it and demanded the return of the vehicle by the 2nd of October 2012.
- [13] On 2 October 2012, Bouwers wrote to Fluxmans and, without providing an invoice, stated that the applicant was fully aware of the cost of repair.
- [14] Bouwers then, on 5 October 2012, suddenly challenged Fluxmans' authority to represent the applicant. The applicant provided the respondent with a power of attorney, and this challenge appears to have been abandoned.
- [15] On 15 October 2012, Fluxmans again requested the invoice. The Respondent still did not provide its invoice. In an attempt to expedite the matter, on 23 October 2012, Fluxmans wrote to Bouwers enclosing a draft guarantee (which made provision for a fixed amount in view of the failure to furnish an invoice). Fluxmans again asked whether the Respondent would release the vehicle against the issuing of the guarantee.
- [16] On 5 November 2012, Bouwers finally provided the respondent's invoice (amounting to R 62 000.01). The Respondent has not itemised its costs and has instead indicated "agreed repair order". There is a dispute of fact as to whether there was an agreement, as alleged by the respondent, and, in particular, whether one Friedland was the applicant's agent. It is not necessary to resolve such dispute in the present proceedings as it is not relevant, at this stage, to the question of whether the guarantee constitutes adequate substituted security.

[17] On 15 November 2012, Fluxmans wrote to Bouwers enclosing a further guarantee from the insurers. This guarantee now covered the full amount of the Respondent's claim. Again the guarantee was tendered in substitution for the Respondent's alleged lien over the vehicle.

[18] In its answering affidavit, the Respondent raises the following issues:

18.1. it accepted the tender of a guarantee as security but did so without considering the actual substance of the tendered security; thereafter, it decided to "revoke its acceptance thereof".

18.2. the tendered guarantee is nothing but a "meaningless piece of paper";

18.3. it alleges that one Friedland represented the Applicant in agreeing to the payment of the Respondent's costs of repairs;

18.4. it appears to contend that the balance of convenience is in its favour (this matter does not however involve an interim interdict) as the Applicant can use public transport as an alternative pending the resolution of the dispute..

[19] There is only one issue in this matter; namely whether the applicant tendered adequate substituted security for the alleged repair lien.

THE LAW

[20] It is trite that the object of a lien is to secure payment of a lien holder's claim against the owner. The Court may order the lien be extinguished against the owner if the owner furnishes adequate security.

[21] The Court has a discretion to be exercised equitably. As stated by , Tindall J (as he then was)¹:

"The weight of authority seems to me to be in favour of the view that even where the claim in respect of which the jus retentionis is asserted is made in good faith, the Court has the power to order delivery to the owner against adequate security. Each case will depend on its particular facts and the Court, in exercising its discretion, will have regard to what is equitable under all the circumstances, bearing in mind that the owner should not be left out of his property unreasonably and on the other hand should not be given possession if his object is, after getting possession, to delay the claimant's recovery of expenses."

CONCLUSION

[24] *In casu* the relevant facts upon which this Court's discretion is based are the following;

24.1. the claim, upon which the lien is based, seems improbable. It is highly unlikely that the applicant, or the person who purportedly acted on her behalf, gave the go ahead for the respondent to execute the repairs at an agreed cost, prior to the insurance company approving same;

¹ Spitz v Kesting 1923 WLD 45 at 49; and more recently Standard Bank Of South Africa Ltd v D Florentino Construction CC and Others 2008 (5) SA 534 (C) at 540H

24.2. The Applicant depends on the vehicle for personal transport for work. The Respondent's suggestions that the Applicant use non-private methods as an alternative means of transport, displays an arrogant and condescending attitude.

24.3. Having agreed to the substituted security, in the form of a guarantee from the Applicant's insurance company, the respondent unjustifiably revoked its acceptance thereof.

24.4. The guarantee is tendered by a registered and well known insurance company. The respondent does not contend that the insurance company will not make good on the guarantee should it succeed in proving its claim.

[25] The respondent's counsel, somewhat hesitantly argued that:

25.1. The respondent has a vested right and the applicant seeks an indulgence;

25.2. The person "speaking" on behalf of the guarantor is the general manager of Telesure and not Dial Direct;

25.3. A rule nisi issued should have to be served on Dial Direct to protect the applicant's vested right.

[26] The respondent's conduct in :

- 26.1. Challenging Fluxman's authority to represent the applicant;
- 26.2. failing to produce the quotation;
- 26.3. reneging on its agreement to accept the guarantee;
- 26.4. referring to the guarantee as a "meaningless piece of paper";
- 26.5. suggesting that the applicant use public transport and;
- 26.6. opposing the application;

demonstrates an obstructive and contemptuous attitude, justifying a punitive costs order.

[27] In the result the following order is made:

1. The Draft order Marked "X" is made an order of court

A handwritten signature in black ink, appearing to read 'Weiner J', with a stylized flourish at the end.

Weiner J

Date of hearing: 11 April 2013

Date of judgment: 01 July 2013

Counsel for Applicant: Adv G.B Rome

Attorneys for Applicant: Fluxmans Attorneys

Counsel for Respondents: Adv H.P Van Nieuwenhuizen

Attorneys for Respondent: Bouwer Cardona Inc.

Order in terms of - 2.15pm -
IN THE SOUTH GAUTENG HIGH COURT, JOHANNESBURG
(REPUBLIC OF SOUTH AFRICA)

CASE NO: 00731/13

Before the Honourable Madam Justice Weiner
On 11 April 2013

In the matter between:

SETHABILE SAMUKELISIWE MTHONTI

Applicant

and

**IN-OUT PANELBEATERS CC t/a
PROFESSIONAL PANELBEATERS**

Respondent

ORDER

Having read the papers and heard counsel for the parties, the Court
makes the following order:

1. The respondent is hereby ordered forthwith, upon service on it of the Guarantee referred to in paragraph 3 below, to hand over to the applicant a 2011 320(i) automatic BMW motor vehicle bearing registration number BJ 58 XS GP ("the vehicle");
2. In the event of the respondent refusing or neglecting or failing to hand over the vehicle to the applicant forthwith upon the service

on it of the said guarantee, authorising the sheriff to obtain possession of the vehicle wherever it may be found and to thereafter hand the vehicle to the applicant;

3. The above handover of the vehicle to the applicant (alternatively, the sheriff) shall take place forthwith after service by the applicant on the respondent of the guarantee of Dial Direct Insurance Company Limited ("Dial Direct") in favour of the respondent, duly signed as to any manuscript amendments thereof by Dial Direct, and a copy of which guarantee (together with the said manuscript amendment(s) thereof) is annexed to this order marked I;
4. Directing the respondent to institute its action (if any) for the costs of repairs and storage in respect of the vehicle, within a period of thirty days from 11 April 2013 failing which the Guarantee shall lapse and be of no further force or effect;
5. Directing the applicant to serve a copy of this order on Dial Direct within seven days of the date of this order;
6. The respondent is directed to pay the costs of this application on the attorney and client scale.

BY ORDER

Registrar, South Gauteng High Court