REPUBLIC OF SOUTH AFRICA

INTHE HIGH COURT OF SOUTH AFRICA

(LIMPOPO DIVISION, POLOKWANE)

CASE NO: 4692/2019

(1) REPORTABLE: YES/NO

(2) OF INTEREST TO THE JUDGES: YES/NO'

(3) REVISED: YES/NO

SIGNATURE:

DATE: 27 MARCH 2023

In the matter between:

STANDARD BANK OF SOUTH AFRICA LTD	**APPLICANT**
And	
MOHLABAFASE PANELBEATING &SPRAYING PAINTING CC	**FIRST RESPONDENT**
KGATABILA ERIC MANIPA (ID NO: 8[...])	**SECOND RESPONDENT**

JUDGMENT

MDHLULI AJ

[1] This is an opposod rei vindicaiio application by the Applicant against the First and Seconds Respondents on its notice of motion for the following:

1.1 That the first Respondent be ordered to return a 2016 Toyota Hilux 2.5 040 with Engine Number: 2[...] and Chasis Number:

A[...] and Registration Number: E[...] 2[...] [...] ("the motor vehicle")

1.2 In the event of the First Respondent failing or refusing to return the said motor vehicle to the Applicant, that the Sheriff of the High Court, alternatively, his deputy, be authorized and directed to remove the said motor vehicle, wherever same may be found, and return it to the Applicant.

1.3 That the Applicant be ordered to furnish security, by way of the guarantee annexed hereto marked annexure "B1", in the amount and on the terms listed therein, alternatively, such amount and terms as the Honorable Court deems fit under the circumstances, against delivery of the motor vehicle to the Applicant.

1.4 Costs of suit the scale as between attorney and client.

1.5 Further and/or alternative relief.

[2] The Applicant is THE STANDARD BANK OF SOUTH AFRICA LTD, a bank. registered in terms of the Banks Act No. 94 of 1990, a registered financial services and registered credit provider in terms of the National Credit Act No.34 of 2005, with principal place oi" business at […] S[...] Street, [...] floor, Johannesburg, Gauteng.

[3] The First Respondent is MOHLABAFSE PANELBEATING & SPRAY.-PAINTING CC, a close corporation duly registered in terms of the Companies Law of the Republic of South Africa with Registration Number: 2[...] and with principal place of business situated at B[...] VILLAGE NEXT TO THE C[...], B[...], Limpopo.
The only opposing party before me.

[4] The second Respondent is KGATABILA ERIC MAMPA an adult male with identity number: 8[...] and who's chosen *domicillium citandi et executandi* at STAND NO: 1[...], SECTIO […] S[...], Limpopo. He is not before me in any way.

[5] The First Respondent's and/or its counsel filed the heads of argument at 09h10 the morning of the hearing. He has included a detailed apology in the heads which is appreciated. Tile First Respondent raised a point in *limine* of dispute of facts which was opposed. I have dealt with this and dismissed the point and reasons thereof are on record. I will not deal with this part of the proceedings in this judgment save to mention this for completeness' sake.

[6] The Applicant is the owner of the motor vehicle. With this application seeks to substitute the form of security for the first Respondent's alleged claim against the second Respondent. The Applicant has offered security against the delivery of the motor vehicle, the security being delivered in substitution of First Respondent's retention and lien over the vehicle in relation to the storage fees, which lien, retention or eligibility to be in possession is being disputed by the Applicant. I\Jonet11eless, the Applicant undertakes to pay the amount of R 33, 744.00 (Thirty-three thousand seven hundred and forty-four rands) plus interest at the rate of 10.5% per annum a *tempore mora* together with legal costs and/or any lesser amount which may be payable in terms of the guarantee and suretyship document to First Respondent on several conditions which I elect not to deal with each detail as they are not taking this matter further on the issues before me.

[7] On or about the 7th of July 2016 the Applicant and Second Respondent entered into a written sale agreement (the agreement), in terms of which the Applicant would remain the owner of the motor vehicle until all amounts due under or arising from the agreement have been paid in full. The Applicant is thus the owner of the motor vehicle.

[8] The Applicant performed its obligations in terms of the agreement. However, the Second Respondent failed to make payments as agreed. As a result of this failure, summons was issued against the Second Respondent for the return of goods under case number 105/2018 in this very court. The Applicant obtained default

judgment against the Second Respondent for amongst others the return of the motor vehicle and the confirmation of cancellation of the agreement on the 23 August 2018. Subsequent to this, a warrant of delivery of the motor vehicle was issued on the 07 September 2018.

[9] However, the Applicant up to date could not manage to obtain possession of the motor vehicle as the First Respondent is in possession thereof, retaining the motor, vehicle on the alleged lien in respect of storage costs exceeding R30,000.00. the Applicant in this application aims at mitigating potential further losses under the agreement with the Second Respondent by obtaining the motor vehicle for sale purposes, which sale proceeds will be credited to the Second Respondent's account. This will also prevent the escalation of the second respondent's indebtedness and will mitigate potential losses to the Applicant The Applicant's doubts that the second Respondent is in a position to compensate it for any damages suffered as a result of his breach of the agreement. Taking into account the Second Respondent's payment history in failure to pay either the Applicant and the First Respondent, the Applicant submits it is peremptory that it be allowed to mitigate potential losses.

[10] From the papers it is clear that the First and Second Respondents entered int an agreement in respect of the motor vehicle for storage which Applicant has no knowledge of and /or was neither a party thereto. The First respondents as at 15 December 2016 claimed storage costs in the amount of R33, 744.00 against the Second Respondent. The Applicant disputes the amount claimed as well as being indebted to the First Respondent and requires the First Respondent to prove its claim in a competent court.

[11] Furthermore, the Applicant is not aware of the conditions of the motor vehicle in relation to whether it is stored in a proper facility, the extent of damages to the motor vehicle if any, whether the motor vehicle is being used by the First Applicant, and if whether the motor vehicle is currently insured by either of the Respondents against the risk of loss and damage.

[12] The Applicant wrote two letters to the First Respondent. demanding return of the goods and tendering security which were not respondent to, hence this application-

.The Applicant dispute the First Respondent is entitled to claim any amount from it, and furthermore that the amounts claimed is unreasonable under the prevailing circumstances. These are issues which will be traversed in the trial court.

[13] The Applicant claims that there will not be any prejudice suffered by the First Respondent by relief sought in this application. That should the First Respondent be successful with any action whatsoever against the Applicant, it will be compensated for its full amount, together with interest if applicable and legal fees. The First Respondent will be left in exactly the same position as it will be should it retain possession of the motor vehicle. However, the prejudice to both the Second Respondent and the Applicant should the First Respondent be allowed to retain possession of the motor vehicle would have dire consequences.

[14] It seems the Second Respondent has abandoned the motor vehicle at the premises of the First Respondent with no intention to pay the First Respondent. Again, the Second Respondent seems not intent in paying the Applicant, as at the 11th of December 2018 he was indebted to the Applicant in the amount of R441, 687.65 together with interest at 12,900% per annum from the 24th November 2018 for which Applicant is receiving no compensation whatsoever. The Applicant has previously on the 28th November 2016 evaluated the motor vehicle and its forced sale value was found to be R100,000.00.

[15] The First Respondent is opposing this application and alleges lien and/or tacit. agreement as reason/s) for its retention of the motor vehicle. Furthermore, on the following grounds: that the amount due to it which is storage fees calculated from 15 July 2016 up to 15 December 2016 was R41, 952.00 per "M1"; that both the Applicant and Second Respondent are indebted to it for storage costs, that it will only willingly release the motor vehicle as it is entitled to possession, whilst Applicant is entitled to ownership-, that the Applicant is not being open with the court as there have been settlement negotiations between itself and the First Respondent as evidenced from two annexure "M5s" dated 23 November 2016 and 28 June 2017 respectively wherein the First Respondent's representatives was accepting the offer to purchase the motor vehicle and requests the dismissal of the spurious application on punitive scale of attorney and own client costs as the Applicant has failed dismally

to make out a case for the relief sought herein. It is important to mention that the settlement negotiations are not disputed by the Applicant.

[16] The following are common facts between the parties per the papers:

16.1 The Applicant is the owner of the motor vehicle.

16.2 The Second Respondent is indebted to the Applicant in the amount of R441, 687.65 as ta 11 December 2018.

16.3 That there is a default judgment against the Second Respondent for confirmation of cancelation of agreement and return of goods amongst others.

16.4 That Second Respondent is in possession of the motor vehicle and refuses to return same subject to payment of storage costs.

16.5 That there was/is no contract between the Applicant and the Second Respondent

16.6 That there were attempts to settle the matter between the parties.

[17] The issues between the parties for dotcrmination bppeoI· to rne to !JG i.hc following on the above facts:

·17.1 Whether the First Respondent has a right of retention (lien)over the motor vehicle in respect of storage costs,

17.2 Whether the First. Respondent has shown any agreement for the service rendered.

17.3 Whether the Applicant is entitled to return of the motor vehicle.

[18] A lien is a right of retention which arises from the fact that one man has put money or money's worth into the property of another - *United Building Society v*

Smookler's Trustees and Galoombick's Trustees[1] . Liens are generally divided into debtor-and creditor liens on the one hand and enrichment liens on the other hand.

[19] Debtor-and-Credit liens are rights of retention conferred on a person who has done work on another's property or rendered a service pursuant to a contract. They are not contractual rights in the strict sense in so far as they are conferred by virtue of the contract, but by operation of law when money or money's worth is put into the property of another in consequence of a prior contractual relationship. They remain personal rights in so far as they are not available against the owner where he or she was not a party to the contract. They can only be enforced against a party to the contract. The lien holder is entitled to his or her contractual remuneration, including his or her profit- See *Van Niekerk v Van den Berg*[2].

[20] In *D Glaser & Sons (Pty) Lid v The Master And Another N0*[3] 1979 (4) '180 it was held that a builder, by virtue of his contract, and by virtue of havi110 put money and money's worth into his debtor's property, can have two lions, one being an enrichment (salvage or improvement) lien in respect of the necessary and/ or useful expenses, and the other being a debtor-creditor lien simpliciter for expenses which do not fall into either of those categories but which are merely luxurious and both these liens can be the result of the same contract.

[21] Enrichment liens are generally regarded as real rights and may take the form of either improvement or salvage liens, depending on whether they relate to useful or necessary expense respectively *(D Glaser & Sons (Pty) Ltd supra*). They are conferred on a person irrespective of any prior relationship between him or herself and the owner of the property. To rely on a salvage or improvement lien, the lien holder must allege and prove: (i) lawful possession of the object; (ii) that the expenses were necessary for the salvation of the thing or useful for its improvement; (iii) the actual expenses and the extent of the enrichment of the owner; and (iv) that

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[1] 1906 TS 623 at 627-628.
[2] 1965 (2) SA 525 (A).
[3] 1979 (4) 780 (CPD).

there was no contractual arrangement between the parties in respect of the expenses- *Brooklyn House Furnishers (Pty) Ltd v Knoetze & Sons*[4].

[22] Salvage and improvement liens are said to be "real" liens. They are real rights. They are not created by contract, but are based on the equitable principle that by the law of nature it is only fair that nobody should become wealthier through the loss and injury of another. See O Glaser & Sons (Pty) Ltd supra.

[23] The right of lien exists only if the lien holder is in possession of the thing to which his or her claim relates and for as long as he or she retains possession thereof. This is subject to exceptions where the lien holder is deprived of possession by force or the threo.t of force or where he or she parts with possession as a result of fraud-*Steenkamp v Bradbury's Commercial Auto Body CC*[5].

[24] The objective of the *rei vindicatio* is to restore physical control of the property to the owner, with ownership forming the basis for such a claim. Three requirements must be met for the *rei vindicatio* to be successfully invoked.[6] In order to succeed with this real right remedy an applicant need to allege and prove:

24.1 That he or she is the owner of the thing;

24.2 That the thing was in the possession of the respondent when proceedings were instituted; and

24.3 That the thing which is vindicated is still in existence and clearly Identifiable.[7]

In this matter all of these requirements are common cause.

[25] The First Respondent in its answering affidavit has not attempted to show this court, which lien it relies on, save to submit that the only way it will willingly release

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[4] 1970 (3) SA 264 (A).
[5] (2882/2019) [2020) ZALMPPHC 9 (23 January 2020)
[6] G Muller et al The Law of Property: Silberberg and Schoeman's 6 ed (2019) at 269-270.
[7] Introduction to the Law of Property, A J Van der Walt et al, Juta, 7th Edition, at 164; Silberbe1·g and Schoeman's The Law of Property, 5th Edition, LexisNexis at 243.

the motor vehicle will be on full payment of its storage costs. Based on the exposition on the law on liens herein above, the would be applicable one may be Debtor and creditor lien. However, this would need for the First Respondent to prove the contract between it and the Applicant. The First Respondent has not made out any case in its papers or in argument on this, because same does not exist. It is trite that a party falls and stands by its papers. The only contract that may exist is between the First and the Second Respondents, the Applicant is not a party thereto. As a result, cannot be held at ransom on "contractual terms" it was not a party to. In any event even if the said alleged contract between the First and Respondents were proven herein it would still not bind and/or apply to the Applicant who is the owner herein.

This alleged contract between the Respondents is in direct violation of the terms of the contract between the Second Respondent and the Applicant to the extent that "The Second Respondent shall not, without the consent of the Applicant, sell, encumber or in any way deal with the motor vehicle, nor allow the motor vehicle to become subject to any attachment, hypothecs, or other legal charge or process". The Second Respondent is in breach of this term amongst others which affects negatively the alleged contract. I find that the Second Respondent has not proved any existence of a contract for which retention can be relied on.

In argument of its position the Second Respondent gave too much attention to the point in *limine* which was dismissed and also the reliance on the settlement negotiations between the Second Respondent and the Applicant both in the heads and during address and neglected the crux of the matter in dispute to its own detriment. A position which is regrettable because the effect thereof I find points to the fact that there was no basis in law for the Second Respondent to oppose this application under the circumstances of this matter. I find that the Second Respondent has not made out a case for which it relies on for any lien. I shall return to this aspect when I deal with costs herein.

Before I rest on this aspect, it is important to note that the counsel for the Second Respondent called for this court to apply the principles of negotiating in good faith as

held in by Baqwa J S v S[8] which I align myself with. However, as a matter of principle, parties are expected to exhaust all domestic available remedies before approaching court as court should be a last resort. But that does not mean that a party is obliged to the settlement negotiations most of which are done without prejudice of rights and at times confidential. In any event settlements are subject to being made an order of court and we have none in this matter. Until a settlement agreement is made an order of court its terms are not obligatory to the parties. Then again applying the said principle of good faith, would require first that the First Respondent should return the car to its rightful owner first and then security issues may be discussed. It can never be in good faith that an owner is harm strung and disposed of its property and still be expected to engage in good faith. It is an unfair expectation of the unlawful possessor, in this case the First Respondent at least to the extent that there is no agreement between it and the Applicant whatsoever in respect of the motor vehicle.

With regard to guarantee the Second Respondent contends that the Applicant has not furnished sufficient security. When one gleans on the parties papers the Applicant has alleged and furnished security of R33, 744.00 in terms of Second Respondent's invoice marked "E1" of the founding affidavit for 15 July 2016 to 15 November 2016. Whereas the Second Respondent claims R41, 952.00 in terms of invoice marked "M1" of the answering affidavit for 15 July 2016 to 15 December 2016. It is common cause that the dispute between the parties arose in 2016 to date.

However, there is no any other invoice issued to the Applicant and/or the Second Respondent since the above mentioned to date. The Second Respondent has not attached any further invoice/s from then to date save for the above mentioned in its own papers and yet claims security is insufficient. This court is unable to thumb suck what would be the amount due to the First Respondent as at the time of institution of this application at least. The explanation and proof of this would assist the First Respondent in this matter before to the extent that provision of security is considered and nothing more as the trial court is best placed to determine this issue. First Respondent in this circumstance ought to make its own case on this aspect that

[8] (11/5810) [2013] ZAGPJHC 312 (5 November 2013).

security is insufficient the Second Respondent has failed. I find that the security furnished by the Applicant is sufficient. In my view whether security is offered or not Applicant is still entitled to return of the motor vehicle.

This pronouncement was made by Jansen JA in Chetty v Naidoo[9]: "It is inherent in the nature of ownership that possession of the res 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."

One of the incidents of ownership, said Jansen JA in *Chetty v Naidoo*[10], 'is the right of exclusive possession of tl1e res, with the necessary corollary that the owner may claim his property wherever found, from whomsoever is holding it. It is inherent in the nature of ownership that possession of the res should be normally 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.[11]

Returning to the circumstances of the matter before me, there is no reason whatsoever why the motor vehicle should not be returned to the Applicant in the mean time whilst other outstanding issues between the parties shall be ventilate din the trial court. Having had sight of the pictures of the damaged motor vehicle attached to the evaluation report marked "F3" it is incumbent upon this court to protect the Rights of the Applicant (the owner) against further loss given Second Respondent's failures herein. As at July 2016 the value had reduced to R100,000.00, it suffices to conclude that the value is much lesser now given the lapse of time. Second Respondent, suffers no prejudice by the return of the motor vehicle as it will get its day in court to prove Whatever costs due. On the other hand, if this order is not granted, the Applicant loses its property and the Second Respondent

[9] 1974 (3) SA 13 (A) at 20B-D
[10] 1974 (3) SA 13 (A), 15 dE-F
[11] At 20B-C

indebtedness keeps rising with no recourse whatsoever. I am of the view that the Applicant has made a proper case for the relief sought.

[26] The Applicant has prayed that costs be granted on the scale between attorney and client's scale. Second Respondent has applied for a punitive cost orde1on attorney and own client's scale. Given my findings herein I will not engage this fu1iher. Costs are for the discretion of the court which must be exercised judiciously. Having regard to the circumstances of this case one cannot help but recall a poem that says "Those who live in glass houses should not throw stones". This poem is used to remind people not to criticise others for their flaw that they themselves possess. This I say in relation to the cost order prayer and its basis herein. The Second Respondent's conduct herein leaves much to be desired as from the onset the Applicant's claim was clear as to what relief it sought and the relief was not in any way taking away the right of the Second Respondent in advancing its own right, just not at this court for purposes of this matter. Second Respondent admitted that the Applicant is the owner throughout, knows very well that there is no contract between itself and the Applicant and thus no defence and yet subjected the Applicant to this litigation. I am of the view that the cost order prayed for is warranted.

[27] In the result I make the following order:

27.1 The Second Respondent, Mohlabafase Panel Beating & Spray Painting CC is ordered to forthwith return a 2016 Toyota Hilux 2.5 D4D with Engine Number: 2[...] and Chasis Number: A[...] and Registration Number: E[...] 2[...] [...]to the Applicant.

27.2 Should the Second Respondent fail to comply with the order in Paragraph (1) above within seven (7) days of service of this order, the Sheriff of this Court is authorized and directed to remove the said motor vehicle, wherever it may be found and return same to the Applicant.

27.3 The Second Respondent shall pay the cost of this suit on the scale as between attorney and client.

R.P MDHLULI
ACTING JUDGE OF THE HIGH COURT,
LIMPOPO DIVISION, POLOKWANE

APPEARANCES

Heard on	13 February 2023
Judgment circulated on:	27 March 2023
For the Applicant :	Adv P.P Baloyi
Instructed by:	Vezi & De Beer Inc. Attorneys
For the Respondent :	Adv P.A Mabilo
Instructed by:	Nakedi Banda Attorneys