

IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN

CASE No.: **1713/2023**

REPORTABLE: YES/NO

OF INTEREST TO OTHER JUDGES: YES/NO

CIRCULATE TO MAGISTRATES: YES/NO

In the matter between:

SPRINGS CAR WHOLESALERS (PTY) LTD
t/a NO FINANCE CARS

Applicant

and

F & H MOTORS CC

Respondent

JUDGMENT BY: VAN RHYN, J

HEARD ON: 17 AUGUST 2023

DELIVERED ON: 23 AUGUST 2023

[1] The applicant, Springs Car Wholesalers (PTY) Ltd t/a No Finance Cars which conducts business as, *inter alia*, a car rental business seeks the following order:

“1. Pending the determination of Part B of this application and within 24 hours of the granting of this order, the Respondent is ordered to hand over the Applicant’s vehicle being a 2014 Nissan Hardbody NP300 with VIN Number AND[...], Engine Number YD 2[...] and with registration number CY8[...] (“the

vehicle”) to the deputy Sheriff who is authorised and directed to deliver the vehicle to the applicant for safekeeping:

2. That the Applicant’s attorneys of record continue to hold an amount of R17 739.28 as security for the Respondent’s alleged claim of R17 739.28, subject to the Respondent issuing a Summons against the Applicant for the aforementioned sum within 20 business days of the date of the order in this Part A or the handing over of the vehicle to the Applicant, whichever is the sooner;

3. That in the event of opposition of this Part A, the opposing Respondent be ordered to pay the costs of the application, and in the event of no opposition, the costs of the hearing of Part A of this Notice of Motion shall stand over for determination by the Court which hears the application for final relief in terms of Part B of the Notice of Motion.”

[2] The respondent is F & H Motors CC, a close corporation with its principal place of business at East End, Bloemfontein where it conducts business as a motor vehicle workshop. On 8 August 2020 the applicant entered into a rental agreement with a certain Mr R D Mmolaoa (“Mr Mmolaoa”) in terms of which the applicant leased the vehicle to Mr. Mmolaoa for a period of 54 months. Mr Mmolaoa took delivery of the vehicle during August 2020, but subsequently failed to pay the rental, in the amount of R 5 950.00 per month, for several months.

[3] During September 2022 the applicant discovered that the vehicle had suffered a mechanical breakdown during May 2022 and that Mr Mmolaoa had the vehicle towed by the respondent for repairs at its workshop. It is common cause that the vehicle is still in the possession of the respondent. The Applicant contends that it is the owner of the vehicle.

[4] Subsequent to repairing the vehicle, the respondent invoiced Mr Mmolaoa in the amount of R17 739.28 as per Annexure “D” to the founding affidavit. The applicant was not a party to the agreement between the respondent and Mr Mmolaoa regarding the repairs to the vehicle and remains unwilling to make payment of the invoice submitted by the respondent for the repairs. The applicant alleges that the vehicle is valued at

R100 600.00 being the current retail value. The applicant contends that it is losing potential revenue as a result of the respondent's refusal to release the vehicle.

[5] In its answering affidavit the respondent, raised 5 points *in limine* apart from its defence. These 5 points *in limine* can concisely be summarised as the following:

5.1. The deponent to the founding affidavit's authority to litigate on behalf of the applicant;

5.2. The foreseeability of a dispute of fact and failure to follow the action procedure;

5.3. Ownership of the vehicle by the applicant;

5.4. Non-joinder of Mr Mmolaoa;

5.5. The issue of the correct forum for the hearing of this matter, taking cognisance of the value of the vehicle and the repair costs as per the respondent's invoice, all being within the Magistrates' Court jurisdiction.

[6] At the commencement of the hearing before me, Mr Roux, counsel on behalf of the respondent, indicated that the non-joinder of Mr Mmolaoa remains a contentious issue on the ground that the respondent will lose its retention of the vehicle in respect of its claim against Mr Mmolaoa. The security proposed by the applicant will only serve as security in respect of the respondent's claim against the applicant and not as security in respect of the respondent's claim against Mr Mmolaoa with whom it contracted regarding the repairs to the vehicle.

[7] The respondent furthermore remains adamant that the applicant should have approached the Magistrates' Court for relief and in the event of the applicant having any substantial success in this application, it would only be entitled to costs on the appropriate Magistrates' Court scale.

[8] Subsequent to issuing this application, but prior to the filing of the respondent's answering affidavit, the respondent served a notice in terms of the provisions of Rule 35(12). A copy of the authorisation granted to the deponent to the applicant's founding affidavit, to depose to the affidavit and to bring the application, was requested. The applicant provided a resolution of the directors of the applicant company, which to my mind disposes of the first point *in limine*. The applicant furthermore appended the Certificate of Registration in respect of the vehicle issued during May 2023 to its replying affidavit which provides an answer to the third point *in limine*, the issue regarding ownership of the vehicle.

[9] The respondent's opposition to the relief sought in Part A of the Notice of Motion is based on its contention that it is entitled to retain possession of the vehicle because it has a *jus retentionis lien* arising from, what is referred to as a "repair lien" and that it would not be in the interest of justice and business in general, if the applicant be permitted to obtain possession of the vehicle to which the respondent effected repairs, without payment. The respondent avers that the applicant's vehicle was repaired and improved by the repairs and that the said amount is due as the applicant has ostensibly been enriched as a result of the repairs effected to the vehicle.

[10] A right of retention (*ius retentiones*) or lien is the right to retain physical control of another's movable or immovable property as security for payment of a claim for money or labour expended on that property. Liens arise by operation of law.¹ There are two main kinds of lien, *viz* salvage and improvement liens and debtor and creditor liens.² The former are based on the principle of unjust enrichment and they are often referred to as 'enrichment liens'.³

[11] The protection afforded by a lien is however limited: the retentor merely has a defence against the *rei vindicatio* of the owner. A debtor and creditor lien, on the other hand, can be enforced only against the other contracting party, in the matter at hand, Mr Mmolaoa. The authors of LAWSA⁴, vol 15 at paragraph 85 states as follows:

¹ Wille's Principles of South African Law, 9th Edition p 661.

² Brooklyn House Furnishers (Pty) Ltd v Knoetze & Sons 1970 (3) SA 264 (A) at 270.

³ Wille's Principles of South African Law (*supra*) p662.

⁴ The Law of South Africa (Second Edition) Vol 15, Part 2.

“The owner of the property subject to a right of retention may defeat the lien by furnishing adequate security for payment of the debt secured and in principle so may any debtor who has a right to possession. However, the mere offer or giving of security by the owner does not confer any right of possession to the owner, but a court may, in its discretion, order cessation of possession against provision of security. Whether a court will exercise its discretion to order restoration of the property to its owner (or the person with a right of possession) depends on the particular facts of each case. The security need not cover the costs of a possible action by the lien holder, since the security serves as a substitution for the lien and not as an additional security”.

[12] On 10 May 2023 the respondent, as the plaintiff, issued summons in the Magistrates’ Court, Bloemfontein against the applicant, cited as the 2nd defendant, for payment of the aforesaid amount. Mr Mmolaoa is cited as the 1st defendant in the Magistrates’ Court matter.

[13] Mr Reinders, counsel on behalf of the applicant, places reliance for the relief sought on the matter of **Pheiffer v Van Wyk**⁵, a judgment by the Supreme Court of Appeal, where the court held that considerations of equity and justice dictate that in the case of a *jus retentionis* based on an enrichment lien, the court has the same discretion as it had in the case of a debtor and creditor lien, i.e. to deprive the lien holder of possession and to substitute such security. Mr Reinders argued that the security bond by the applicant’s attorney in the amount of R17 739.28 and which is tendered pursuant only to the granting of judgment against the applicant in favour of the respondent, provides adequate security in respect of the respondent’s claim against the applicant.

[14] Two reasons as to why this court should not grant the relief sought were raised by Mr Roux. These two arguments hinge on:

14.1 An important distinction exists regarding the factual position relating to the three (3), relevant parties in the **Pheiffer** matter and the three (3) parties in the matter at hand. One of the parties in the matter at hand, Mr Mmolaoa, is not a

⁵ 2015 (5) SA 464.

party before the court. Therefore, the non-joinder of Mr Mmolaoa in this matter compromises the respondent's position.

14.2 The second issue is the mode of security: whether the security in the form of an undertaking by an attorney, is sufficient to discharge the respondent's lien. The respondent, with reference to **Steyn Lyell Maeyane Attorneys v Oelofse**⁶ argued that the written undertaking given by a firm of attorneys does not constitute adequate security, similar to the security by way of a bank guarantee in the **Pheiffer** matter.

[15] Mr Mmolaoa is responsible, in terms of the provisions of the rental agreement between him and the applicant, for, *inter alia*, the service, repair and maintenance of the vehicle whilst the vehicle is in his possession and during the existence of the rental agreement. The respondent therefore contends that Mr Mmolaoa had the necessary authority to provide instructions to the respondent to effect repairs to the vehicle.

[16] From the invoice submitted by the respondent it is evident that the amount of R17 739.28 has been outstanding since 17 May 2022. There can be no doubt that Mr Mmolaoa has abandoned the vehicle and has failed to regain possession of the vehicle for approximately 15 months. During September 2022 Mr Mmolaoa's account with the applicant was in arrears. The applicant struggled to make contact with Mr Mmolaoa, who obviously did not report the mechanical breakdown of the vehicle to the owner. Evidently Mr Mmolaoa has abandoned the vehicle and is not in the least perturbed by the respondent's lien.

[17] Regarding the respondent's argument that it would lose its retention lien *vis a vis* Mr Mmolaoa in the event of an order granted in terms of Part A of the Notice of Motion, I am of the view that the respondent's retention of the vehicle must be evaluated against the obvious disinclination of Mr Mmolaoa to regain possession of the vehicle. There is no legal basis upon which the applicant can be ordered to provide any form of security for the respondent's claim against Mr Mmolaoa.

⁶ 2017 JDR 0543 (SCA).

[18] As to the second objection regarding the mode of security the following considerations are relevant:

18.1 The applicant initially averred that its attorney of record holds and shall continue to hold an amount of R17 739.28 as security for the respondent's claim subject to the conditions as set out above. Appended to the replying affidavit, marked annexure G, the applicant filed a "Security Bond" dated 5 June 2023 in the Magistrates' Court proceedings under case number 3828/2023.

18.2 However, the heading of the Security Bond refers to the applicant as being the first as well as the second Defendant, which is clearly wrong. In terms of the security bond the applicant's attorney irrevocably undertakes to pay to the respondent a maximum amount of R17 739.28 pursuant only to the granting of a judgment against the applicant (the second defendant in the Magistrate's Court proceedings) after the applicant having exercised its options of appeal or review should it elect to do so.

[19] At the hearing of the matter, Mr Reinders indicated that the applicant will have no objection if it is ordered that the amount of security be kept in trust by the respondent's attorney rather than the applicant's attorney. The respondent is amenable to this offer which provides a solution to the respondent's objection in this regard.

[20] On behalf of the applicant it is contended that the longer the respondent continues to refuse to hand over control and possession of the vehicle, the greater the prejudice to the applicant. This is a case where the court needs to consider an exercise of a discretion. From the relevant case law, the weight of authority seems to be in favour of the view that even where the claim in respect of which the *ius retentionis* is stated is made in good faith, the court has the authority to order delivery to the owner against adequate security.

[21] Each case will depend upon 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 of the vehicle should not be left without his property unreasonably and, on the other hand, should not be given possession if his object is, after obtaining

possession thereof, to delay the respondent's recovery of expenses.

[22] The applicant has been deprived of possession of its vehicle and, to an unknown extent, also of rental income in terms of the lease agreement with Mr Mmolaoa since approximately September 2022.

[23] Although the general rule is that the successful party should be awarded costs, the court can, in the exercise of its discretion, deprive a successful party of costs either wholly or partly. I am of the view that the respondent cannot be criticized for questioning the allegation regarding ownership of the vehicle in the light of the Certificate of Registration appended to the founding affidavit, marked Annexure "A". The date of issue of this certificate is March 2014 and the owner of the vehicle is indicated as Thrifty Car Rental. On the applicant's own version, it purchased the vehicle on 12 November 2019.

[24] In its reply to the respondent's Rule 35(12) Notice and also in reply to the answering affidavit, did the applicant remedy the confusion regarding the ownership of the vehicle. I am therefore of the view that the allegations in the applicant's founding affidavit were insufficiently detailed to enable an inference of ownership in the applicant to be made.

[25] I further take into consideration the amount relevant to this matter, which is R17 739.28 as well as the value of the vehicle being R100 600.00. The applicant has however failed to justify its recourse to the High Court in respect of this application taking into account that the applicant envisaged the respondent to proceed with its claim in the Magistrates' Court.

[26] I am therefore satisfied that the respondent was entitled to oppose the application, not only in respect of the mode of security presented by the applicant, which was remedied by the offer made at the hearing of the matter, but also as a result of the confusion regarding ownership of the vehicle. These considerations are relevant to the costs incurred by the respondent having been dragged to the High Court by the applicant where this matter could have been disposed of in the Magistrates' Court. I am therefore of the view that the respondent is entitled to all its costs.

ORDER:

[27] The following order is therefore made:

1. Respondent is ordered to hand over to the applicant, within three (3) days of this order, the 2014 Nissan Hardbody NP300 with VIN Number AND[...], Engine Number YD 2[...] and with registration number CY8[...] ("the vehicle"), presently in its possession.
2. The Applicant, through the attorney acting on behalf of the Respondent, shall continue to hold an amount of R17 739.28, as security for the Respondent's claim in the aforesaid amount pending finalization of the action instituted by the Respondent amongst others against the Applicant under case number BFN 3828/2023, and in the event of granting judgment against the Applicant under the aforementioned case number, to effect payment to the Respondent to a maximum amount of R17 739.28
3. The amount in paragraph 2 above shall be paid by the attorney acting on behalf of the Applicant to the attorney acting on behalf of the Respondent, within three (3) days of this order, to be held in trust as per paragraph 2 above and to be held so further pending finalization of any appeal/review in case number 3828/2023.
4. The applicant shall pay the costs of this application.

I VAN RHYN

JUDGE OF THE HIGH COURT,
FREE STATE DIVISION, BLOEMFONTEIN

On behalf of the Applicant:

ADV. S J REINDERS

Instructed by:

HENDRE CONRADIE INC
(ROSSOUWS ATTORNEYS)

BLOEMFONTEIN

On behalf of the Respondent:

ADV. L A ROUX

Instructed by:

BADENHORST ATTORNEYS

BLOEMFONTEIN