

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: 2022-008554
NOT OF INTEREST TO OTHER JUDGES
NOT REVISED
11/09/23

In the matter between:

SPRINGS CAR WHOLESALERS (PTY) LTD

t/a NO FINANCE CARS

APPLICANT

and

DIAMOND PANELBEATERS AND TOWING CC

RESPONDENT

JUDGMENT

Van der Schyff J

Introduction

[1] In this application, which was initially instituted in the urgent court, the applicant seeks the return of two motor vehicles currently in the respondent's possession.

The application is brought in two parts. In addition to the return of its motor vehicles, the applicant seeks confirmation that its attorneys of record may continue to hold an amount of R75,817.50 in trust as security for the respondent's alleged claim, subject thereto that the respondent issues and serves summons against the applicant within twenty court days from the date of the order granted herein. In Part B, the applicant claims the difference between the retail value of the vehicles on the dates the respondent took possession of the applicant's respective motor vehicles and the retail value of the motor vehicles on the date of their handing over to the applicant.

- [2] The respondent opposes the application. The respondent raised points *in limine* in its answering affidavit. These were not revisited in argument, nor is it addressed in the respondent's heads of argument. I do not intend to deal with the points *in limine* raised in the answering affidavit, except to mention that the points *in limine*, due to their nature, are for the consideration of the court dealing with Part B of the application.

- [3] The respondent opposes the relief sought in this application on two grounds. The first is that the applicant's *locus standi* has not been admitted. The second is that the respondent submits that it has a salvage lien, and the security tendered by the applicant to permit the court to exercise its discretion and release the vehicles from the salvage lien, is wholly inadequate.

The *locus standi* issue

- [4] It is appropriate to first deal with the *locus standi* issue raised by the respondent.

- [5] The applicant pleaded in the founding affidavit that it is:

'... a private company with limited liability, registered as such [in] accordance with the laws of the Republic of South Africa with registration number 2008/014857/07 and with its principal place of business at 1[...] North Rand Road, Boksburg, Gauteng. The applicant also trades as Thrifty Car Rental.'

[6] The respondent pleaded as follows in its answering affidavit:

'Save to state that the respondent bears no knowledge as to the name, incorporation, registration number, address, and trading names of the applicant, and for that reason cannot admit same, the remaining allegations are admitted.'

[7] In reply, the applicant avers:

'The respondent is clearly attempting to mislead this honourable court. Annexed through the respondent's own answering affidavit are several documents and emails clearly showing the applicant's name, trading name and address.'

[8] The respondent correctly submits that it is trite law that the onus is on the applicant, as the *dominus litis* party, to allege and prove that it has *locus standi*. The respondent avers that in not admitting that the applicant is a company with limited liability, registered as such in accordance with the laws of the Republic of South Africa, these aspects remained in dispute. As a result, the respondent contends, the applicant failed to prove its *locus standi*, and the application stands to be dismissed on this ground alone.

[9] *Locus standi* is relevant in two contexts. The first relates to the preliminary legal question that must be considered in the judicial process as to whether the parties to the litigation have the necessary standing or legal capacity to act. The applicant must show that it is the rights-bearing entity.¹ Cameron JA held in *Sandton Civic Precinct (Pty) Ltd v City of Johannesburg and another*² that:

'...while in a sense this is technical, and procedural, it also goes to the substance of the applicant's entitlement to come to court.'

¹ *Land and Agricultural Development Bank of SA v Parker and Others* 2005 (2) SA 77 (SCA).

² 2009 (1) SA 317 (SCA) at para [19].

- [10] The second relates to an applicant's interest in the subject-matter of the litigation. It is trite that *locus standi in iudicio* concerns 'the sufficiency and directness of a litigant's interest in proceedings which warrants his or her title to prosecute the claim asserted'. It should be one of the first things to be established in litigation. The Supreme Court of Appeal dealt extensively with the notion of *locus standi in iudicio* in *Four Wheel Drive Accessory Distributors CC v Rattan NO*.³ The court explained that it is necessary to determine:

'Whether in the circumstances the plaintiff had an interest in the relief claimed, which entitled it to bring the action. Generally, the requirements for *locus standi* are these. The plaintiff must have an adequate interest in the subject matter of the litigation, usually described as a direct interest in the relief sought; the interest must not be too remote; the interest must be actual, not abstract, or academic; and it must be a current interest and not a hypothetical one.'

- [11] The question is whether a dispute of fact arises as a result of the respondent not admitting the applicant's name, incorporation, registration number, address, and trading names, or to put it differently, whether the respondent's inability to admit the correctness of the applicant's registration as a private company because it bears no knowledge of those facts, equates a denial of the averment pleaded.
- [12] In *Room Hire CC (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd*,⁴ Murray AJP indicated the principal ways in which a dispute of fact arises. He stated:

'The clearest instance is, of course, (a) when the respondent denies all the material allegations made by the various deponents on the applicant's behalf and produces or will produce positive evidence by deponents all witnesses to the contrary. He may have witnesses who are not presently available or who, though adverse to make an

³ 2019 (3) SA 451 (SCA) at para [7].

⁴ 1949 (3) SA 1155 (T) 11633 -11634.

affidavit, would give evidence *viva voce* if subpoenaed. There are however other cases to consider. The respondent may (b) admit the applicant's affidavit evidence but allege other facts which the applicant disputes. Or (c) he may concede that he has no knowledge of the main facts stated by the applicant, but may deny them, putting applicant to the proof and himself giving or proposing to give evidence to show that the applicant and his deponents are biased and untruthful or otherwise unreliable, and that certain facts upon which applicant and his deponents rely to prove the main facts are untrue. The absence of any positive evidence possessed by a respondent directly contradicting applicant's main allegations does not render a case such as this free of real dispute of fact. Or (d) he may state that he can lead no evidence himself or by others to dispute the truth of the applicant's statements, which are peculiarly within applicant's knowledge, but he puts applicant to the proof thereof by oral evidence subject to cross-examination.

The last-mentioned instance, viz., (d) has been held by Watermeyer, C.J. ... Not to be a genuine or real dispute of fact. Whether the respondent is *bona fide* or not, his contentions are insufficient to render resort to a trial action compulsory. ... if the dispute is of this last-mentioned kind, and if the respondent desires oral evidence ... such cross-examination is sufficient safeguard for him, without requiring the case to be sent to trial. In fact, if he does not ask for or declines an offered opportunity for such cross-examination, the court may decide the matter on the affidavits before it.'

- [13] The way in which the respondent pleaded to the applicant's averment that it is a private company with limited liability, registered in terms of the laws of the republic with a registration number and specific address, does not fall into any of the categories mentioned in *Room Hire*. Although it closest resembles (d), it stops short of requiring the applicant to prove its registered name, registration number, address, etc. It also does not fall into (c), because the respondent does not, in

addition to stating that it does not have knowledge of the facts stated by the applicant, deny the allegation made by the applicant.

- [14] If regard is had to the totality of the answering affidavit, the respondent admits that the applicant is the owner of the two motor vehicles in question. By admitting that the applicant acquired full ownership of the vehicles concerned, the respondent implicitly acknowledges that the applicant has the necessary legal capacity to perform juristic acts. The weight of the *locus standi* issue fades against this admission, and it becomes purely a technical point raised. The applicant's undisputed ownership of the motor vehicles concerned, substantiates both that it has the necessary capacity to conclude juristic acts, a capacity it has as a juristic person, and it substantiates the applicant's direct interest in the subject matter of the litigation. The applicant's claim that it is a juristic person is further substantiated by the letter issued by ABSA Bank, where the applicant is cited as 'Client - Spring Car Wholesaler (Pty) Ltd.' It can be accepted as a matter of general knowledge that in order to comply with its obligations in terms of the Financial Intelligence Centre Act 38 of 2001, the bank would have verified the applicant's identity and proof of address when its account with the bank was opened. In addition, CIPC records are public records, and the applicant provided sufficient information for the respondent to verify the correctness of the averment as pleaded. The applicant's failure to attach a CIPC certificate to its founding papers, in the context of the facts admitted by the respondent, is not fatal to the application. The applicant proved that it has the necessary *locus standi* to institute the application.

The factual matrix and the parties' submissions

- [15] The applicant is the owner of two motor vehicles, a Volkswagen Polo Vivo (vehicle 1) and a Kia Picanto (vehicle 2). Vehicle 1 was financed through ABSA Vehicle Management Solution, and the applicant, trading as No Finance Cars, acquired ownership on 17 May 2022. Vehicle 2 was financed through Kia Motors Demo Fleet, and on 25 May 2022, the applicant, trading as No Finance Cars, acquired ownership.

- [16] The applicant concluded a rental agreement with a Mr. Mmotla in terms of which vehicle 1 was leased to Mr. Mmotla for a period of 54 months. On 16 January 2022, a certain Mr. Patjane, driving vehicle 1, was in an accident. Mr. Patjane arranged and agreed with the respondent to tow vehicle 1 from the scene of the accident to the respondent's premises in Mapobane. The respondent avers it dealt with a Mr. Mohlala. For purposes of this judgment, it suffices to differentiate between the applicant as the owner, and the driver of the vehicle with whom the respondent contracted, irrespective of the driver's identity. The driver of the vehicle concluded a written contract with the respondent in respect of the towing of vehicle 1.
- [17] The applicant concluded a rental agreement with Mr. Sandleni in terms of which vehicle 2 was leased to Mr. Sandleni for a period of 54 months. Vehicle 2 was involved in an accident on 25 March 2022, and Mr. Sandleni arranged with the respondent to tow the vehicle from the scene of the accident to its business premises. The respondent concluded a written agreement with Mr. Sandleni in respect of the towing of vehicle 2.
- [18] Both the vehicles' drivers agreed that the vehicles would be stored at the respondent's premises at an agreed storage fee until the respondent's account was paid in full.
- [19] Both rental agreements concluded between the applicant and Messrs. Mmotla and Sandleni, respectively, contain, amongst others, the following terms:
- ‘No Finance Cars will bear no responsibility for payment of any unauthorised repair work or parts supplied or any other service without the express prior written consent of No Finance Cars’
- ‘The renter shall be obliged to return the vehicle at the termination of the rental agreement in substantially the same condition as the date of delivery at the commencement of the rental agreement, fair wear and tear accepted.’

‘In the event of roadside assistance or in the event of a breakdown/workshop booking, contact the numbers on the cover of this booklet’.

- [20] The applicant became aware that the respective vehicles were in the respondent's possession at the beginning of February 2022 and May 2022, respectively. The applicant avers that it made several attempts at resolving the matter with the respondent but to no avail. The respondent provided the applicant with two respective invoices for storage costs in the amounts of R50 000.00 and R15 817.50. Around 11 May 2022, the applicant tendered to pay the amounts reflected in the invoices with its attorney in trust as security for the respondent's alleged claim for the storage costs. The respondent did not accept the tender. The storage costs have since accumulated to R285 816.00 (capital) and R120 000.00 (interest).
- [21] The respondent avers that whilst Messrs. Sandleni and Mmotla (or Mohlala) are liable for the towing and storage costs as per the agreements concluded with them, the respondent is entitled, in terms of the common law as against the applicant, to assert a salvage lien for the necessary or useful expenses incurred in storing the vehicles. The respondent avers that it can only store 50 vehicles on its premises and could consequently not store any other vehicles in the space occupied by the applicant's vehicles, that the storage costs claimed are market-related, and that the vehicles are being preserved in a safe and secure environment. The respondent falls short of pleading that it indeed had to turn away other vehicles in addition to the logical consequence that it could not store vehicles in the space occupied by the applicant's vehicles.
- [22] It is common cause that the applicant acquired what it refers to as 'full ownership' of the vehicles, respectively, on 17 May 2022 and 25 May 2022. The respondent contends that the applicant was not entitled to claim restitution before it acquired ownership of the vehicles. The applicant contends that although the financing institutions financed the vehicles, they were 'title holders', but the applicant was the owner of the vehicles.

- [23] The applicant states that the respondent was not authorised to tow any of the said vehicles. The applicant claims that both vehicles had a sticker or sign on their side, clearly stating that the vehicles could only be towed by companies authorised to do so by the applicant. The respondent did not deny the presence of the stickers on the vehicles nor pleaded that its employees did not see the stickers. The respondent pleaded that because neither of the drivers of the vehicles advised it of any deficiency in their respective titles, the 'alleged' stickers on the vehicles had no significance. The respondent avers that *'there is no basis why the stickers ought to have to been given priority over and above the contractual obligations and warranties given by Messrs. Mmotla and Sandleni.'* In reply, the applicant states, '*[t]he respondent is a towing company and liaises with rental companies and is aware that the rental companies all have stickers confirming ownership of vehicles and that same may only be towed by authorized towing companies.'*
- [24] In its answering affidavit, the respondent does not explain the factual scenario within which the instructions to tow the vehicles were obtained. Neither does it provide any facts from which it can be asserted that the vehicles were in danger of being damaged or stolen if they were not towed away and stored by the respondent.
- [25] The applicant claims that as the owner of the vehicles, it is entitled to have its possession restored. The applicant claims the respondent's reliance on a salvage lien is bad in law. The applicant submits that the respondent will only be entitled to security against the release of the vehicles insofar as a *lis* exists between the parties. As for the respondent's contention that the applicant has been unjustifiably enriched at its expense and that the respondent holds a lien as security for such *lis*, the applicant submits that storage costs do not constitute enrichment, and that an enrichment lien cannot exist in the absence of a cause of action based on enrichment,
- [26] The respondent denies that it was not authorised to tow the vehicles, as it was authorised to do so by the drivers of the vehicles who ostensibly guaranteed that they were the owners. The respondent claims that it is entitled to claim storage fees, as a result of which it holds a salvage lien over the vehicles. The respondent

submits that the court is bound by the Full Court decision of *Ford v Reed Bros*,⁵ where the court held that storage fees and the legal costs of enforcing it may be raised as part of the salvage lien. The respondent contends that the applicant's tendered security was materially deficient in that it was calculated on invoices that were respectively two months and a month old when the tender was made. The respondent's claim currently exceeds the amount tendered as security.

The issue

- [27] The court is required to determine whether the respondent asserts a salvage lien against the applicant in relation to the applicant's two vehicles in circumstances where the respondent contractually agreed with the drivers of the two motor vehicles concerned, that it would tow the vehicles to its premises, and keep the vehicles in its possession whilst charging storage fees, until its accounts are fully paid by the two drivers, respectively. The drivers failed to honour their agreements. Although the respondent has a claim for the towing and storage costs against the respective drivers based on the contractual agreement, the question is whether it can assert a salvage lien over the applicant's vehicles because it provided towing and storage services and kept the vehicles locked up in a secure environment.
- [28] Both the applicant and the respondent face a dilemma because of the drivers' failure to honour their agreements with both the applicant and the respondent. The respondent can assert a debtor-creditor lien against the drivers, but the owner, who has no part in the arrangement between the vehicles' drivers and the respondent, is deprived of its property as long as the respondent refuses to hand it back. If the respondent is to hand the vehicles back to its owner, it will still have a claim against the drivers, but it will lose its real security.

The applicable legal principles

⁵ 1922 TPD 266, 271.

[29] It is trite that the *rei vindicatio* is the primary remedy for an owner reclaiming possession of its property from a respondent. The applicant only needs to prove that it is the owner of the object in question, that the object is still *in esse* as an independent thing, and that the respondent is in control thereof.⁶ If the respondent wants to rely on an alleged legal justification for its control over the object, the onus to prove this is on the respondent.⁷

[30] The Supreme Court of Appeal dealt with the requirements for establishing a salvage lien in *Brooklyn House Furnishers (Pty) Ltd v Knoetze and Sons*.⁸ The discussion commenced regarding liens in general. The court explained:

“n Retensiereg, *jus retentionis*, is die reg wat die besitter van ‘n saak van iemand anders, waaraan hy geld of arbeid bestee het, verkry om die saak in sy besit te hou totdat hy volgens ooreenkoms of, waar daar geen ooreenkoms was nie, vir sy werklike uitgawes of arbeid, maar hoogstens tot die mate van die eienaar se verryking, vergoed is. Dit is bloot ‘n verweer teen die eienaar se *rei vindicatio*, en maak op sigself geen eisorsaak uit nie. Ons reg ken drie soorte retensieregte, nl. (1) retensieregte vir die berging of bewaring van ‘n saak (‘salvage liens’); retensieregte vir verbeterings (‘improvement liens’) en (3) retensieregte vir skuld *ex contractu* (‘debtor and creditor liens’).

[A lien or right of retention, *jus retentionis*, is the right which the possessor of another’s thing, on which he has spent money or labour, retains the thing in his possession until he is compensated as agreed or, where there was no agreement, for his actual expenses or labour, but at most to the extent of the owner’s enrichment. It is simply a defence against the owner’s *rei vindicatio* and does not constitute a

⁶ *Goudini Chrome (Pty) Ltd v MCC Contracts (Pty) Ltd* 1993 (1) SA 77 (A) 82; *Concor Construction (Cape) (Pty) Ltd v Santambank Ltd* 1993 (3) SA 930 (A); *Graham v Ridley* 1931 TPD 476; *Chetty v Naidoo* 1974 (3) SA 13 (A).

⁷ *Singh v Santam Insurance Company Ltd* 1997 (1) SA 291 (SCA).

⁸ 1970 (3) SA 264 (A).

cause of action. Our law recognises three types of liens, viz. (1) liens for the storage or preservation of a matter ('salvage liens'), liens for improvements ('improvement liens'), and (3) liens for *debts ex contractu* ('debtor and creditor liens').] (My translation.)

- [31] The right of retention is conferred on the creditor not by virtue of a contract, but by operation of law.⁹ The lien serves as security for the payment of a debt owed to the lien holder (or retentor).¹⁰ Liens are accessory to a principal obligation, and can therefore only afford protection against the debtor of the *retentor*. The obligation can follow from a contract between the parties (debtor and creditor lien), from circumstances where the *actio negotiorum gestorum* is applicable, or from the unjust enrichment of the respondent at the expense of the plaintiff. Hence, the nature of the lien is determined by the nature of the expenses spent on the thing, and by the existence or not of a contractual relationship between the parties. Expenses that can be incurred in relation to a thing can be *impensae necessariae* (necessary), *impensae utiles* (useful), or *impensae voluptuariae* (luxurious). Necessary expenses are expenses incurred to ensure the preservation or protection of the thing.¹¹ These expenses are usually necessary for the continued existence of the property or thing in its present form – thus, to prevent its value from decreasing.¹² In *Brooklyn House Furnishers*, Botha JA held that necessary expenses incurred to protect or preserve a third party's property, tacitly create a lien in relation to the property, in respect of such expenses.¹³

⁹ Muller, G., Brits, R., *et al* (eds) *Silberberg and Schoeman's The Law of Property*, 6th ed. LexisNexis, Chapter 17. Brits, R. *Real Security Law* 2016, 484.

¹⁰ *Silberberg and Schoeman, supra*, 487.

¹¹ *Brooklyn House Furnishers, supra*, 270H. Digesta D50.16.79 as quoted by De Vos, W, in *Verrykingsaanspreeklikheid in die Suid-Afrikaanse Reg* 1987 JUTA, 50 – '*Impensae necessariae sunt, quae si facta non sint, res aut peritura, aut deterior futura sit*' [Expenditures are necessary, which, if they are not incurred, the thing will either perish, or deteriorate].

¹² *Silberberg and Schoeman, supra*, 489.

¹³ *Brooklyn House Furnishers, supra*, 270H.

[32] Botha JA explained that liens for the preservation and improvement of things are real rights,¹⁴ and do not arise from agreement. These liens are referred to as enrichment liens. Enrichment liens are founded on the principle that no one should be enriched at the expense of another. An owner is enriched not only if the value of its property has increased as the result of another person having expended money on it by effecting improvement to the property,¹⁵ but also if such expenditure has prevented a decrease in its value (salvage).¹⁶

[33] Botha JA then specifically stated:

‘Waar daar geen verryking vir die eienaar van die saak is nie, kan geen sodanige retensiereg tot stand kom nie.’¹⁷ – [Where there is no enrichment of the owner of the matter, no such lien can be established.]

[34] He continued to explain that the approach of the courts regarding the requirements for establishing a salvage lien is in accordance with what is stated by our common law authors, and held that *any* possessor of another’s property is entitled to a salvage lien for reasonable expenses incurred by him for the protection of the property against damage or loss, provided that he did not obtain possession unlawfully.¹⁸ Botha JA did not consider that the enrichment of the owner needs to be *sine causa* for the lien to exist.¹⁹ As indicated below, this assertion was

¹⁴ The question as to whether liens should be regarded as real rights is a contentious academic issue and it is not for present purposes necessary to deal with the issue here. See Sonnekus, J.C., Retensieregte – nuwe rigting of misverstand *par excellence*? 1991 JSAL 462 – 482, 464.

¹⁵ *Avfin Industrial Finance (Pty) Ltd v Interjet Maintenance (Pty) Ltd* 1997 (1) Sa 807 (T).

¹⁶ De Vos *Verrykingsaanspreeklikheid*, *supra*, 329; *Brooklyn House Furnishers*, *supra*, 271E-F, *Guarantee Investment Cooperation Ltd v Shaw* 1953 (4) SA 479 (SR) at 481-482; *Silberberg and Schoeman*, *supra*, 488.

¹⁷ *Brooklyn House Furnishers*, *supra*, 271 C.

¹⁸ *Brooklyn House Furnishers*, *supra*, 275A-B.

¹⁹ This approach was criticised. See, *inter alia*, Sonnekus, J.C., Retensieregte – nuwe rigting of misverstand *par excellence*? 1991 JSAL 462 – 482

subsequently called into question by Van Heerden JA in *Buzzard Electrical (Pty) Ltd v 158 Jan Smuts Avenue Investments (Pty) Ltd en 'n Ander*.²⁰

- [35] *Brooklyn House Furnishers* is authority for the proposition that an enrichment lien, which serves as a defence against an owner's *rei vindicatio*, may arise when the holder of the property incurs necessary expenses in terms of a valid contract with a third party.²¹
- [36] In *Buzzard Electrical (Pty) Ltd v 158 Jan Smuts Avenue Investments (Pty) Ltd*,²² the Supreme Court of Appeal affirmed that a right of retention does not exist *in vacuo* but serves as reinforcement of an underlying claim. This decision confirms that an enrichment lien cannot exist without an underlying enrichment action. In *Buzzard*, Van Heerden JA noted that as far as Botha JA intimated that different considerations apply when a direct enrichment claim is raised than those applicable to an indirect enrichment-entitlement when a party relies on an enrichment lien, he was wrong.²³ The court held that there could be no question of either a direct or indirect enrichment entitlement if there was no unjust enrichment of the owner.²⁴ Van Heerden JA, however, distinguished between the facts in *Buzzard* and the facts that were before the court in *Brooklyn House Furnishers*, and stated that it was not necessary to deal with the question as to whether an enrichment claim exists in factual contexts similar to the context in *Brooklyn House*

²⁰ 1996 (4) SA 19 (A).

²¹ *Brooklyn House Furnishers*, *supra*, 274-275.

²² 1996 (4) SA 19 (A).

²³ *Buzzard*, *supra*, 261.

²⁴ Van Heerden JA differentiated between types of enrichment situations. He explained: 'The first comes into play in a case in which A, in accordance with a contract with B, makes improvements to or on the property of a third party ('the owner') and then towards the latter contends that an enrichment liability has arisen on his part. The second applies in a case in which the owner contracts with B for his cause to improve; B then enters into a subcontract, or something lesser, with A to carry out the work; A carries out the work, and later sues the owner based on enrichment on the latter's part, or relies on a lien.'

Furnishers.²⁵ As a result of the finding I come to below, it is not necessary to deal with this issue.

[37] The aspects that a party (the defendant or respondent raising the defence against the owner's *rei vindicatio*) must allege and prove to rely on a salvage lien, are comprehensively set out in *Ambler's Precedents of Pleadings*.²⁶

- 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 extent of the enrichment of the plaintiff;
- iv. That the plaintiff's enrichment is unjustifiable; and
- v. That there was no contractual arrangement between the parties²⁷ in respect of the expenses

Discussion

[38] It is trite that the law does not exist in a vacuum. Legal principles must be applied to the unique factual context of each matter. This principle is illustrated in *Brooklyn House Furnishers* when Botha JA states:²⁸

‘Appellant sou dus, vir die ontstaan van ‘n bewaringsretensiereg, verryk gewees het, indien respondent se arbeid en uitgawes aan die meubels nodig was vir hulle behoud en beskerming.

Volgens getuienis blyk dit dat mev. Bond op ‘n kleinhoewe buite Johannesburg gewoon het, en omdat sy na die hospitaal moes gaan, en die woning blykbaar moes of wou ontruim, is vir die verwydering

²⁵ For a discussion of this issue, see Sonnekus, J.C. ‘*Rei vindication* teenoor terughoudingsbevoegdheid – ‘n allegaartjie van verwarring’ 2003:3 *Journal of South African Law* 387 - 614.

²⁶ Harms, LTC. *Ambler's Precedents of Pleadings* 8th ed. LexisNexis at 240.

²⁷ And in appropriate circumstances a third party.

²⁸ *Brooklyn House Furnishers*, *supra*, 271F-H.

van haar meubels gereël, en nie slegs vir die meubels waarna die huurkoop kontrak verwys nie. *By die verhoor was dit nie betwis nie dat, indien die meubels sonder toesig in die huis gelaat sou gewees het, enigeiets daarmee sou kon gebeur het – hulle sou gesteel of beskading kon word.*

In die lig van hierdie omstandighede kon dit nouliks betwis word, en is dit ook nie betwis nie, dat die vervoer en die opberging van die meubels vir hulle behoud en beskerming nodig was, en dat die respondent se arbeid en onkoste in verband daarmee noodsaaklike uitgawes was.’ (My emphasis.)

[Appellant would, therefore, for the creation of a salvage lien, have been enriched if respondent's labour and expenses on the furniture were necessary for their preservation and protection.

According to the evidence, Mrs. Bond apparently lived on a smallholding outside Johannesburg. Because she had to go to the hospital and apparently had to or wanted to vacate the house, arrangements were made for the removal of her furniture, and not only for the furniture referred to in the hire purchase contract. *At the trial it was not disputed that, if the furniture had been left unattended in the house, anything could have happened to it - it could have been stolen or damaged.*

In the light of these circumstances, it could hardly be disputed, nor was it disputed, that the transport and storage of the furniture were necessary for their preservation and protection and that the respondent's labour and expenses in connection therewith were necessary expenses.] (My translation.)

- [39] The importance of applying legal principles in the factual context of each individual matter, is further highlighted in *Brooklyn House Furnishers* where Botha JA emphasises that the question as to whether the appellant was enriched through the respondent's storage of the furniture, must be determined in the light of the

circumstances that actually prevailed.²⁹ Botha JA referred to the decision in *Colonial Cabinet Manufacturing Co v Wiid*,³⁰ where Watermeyer J said:

'No evidence was given of any circumstances which show that the plaintiff was benefitted or enriched by the storage of the wardrobe by the defendant'.

Botha JA then said –

'Die feite in daardie saak is klaarblyklik te onderskei van die feite van die onderhawige, waar daar getuienis is oor die omstandighede waaronder die meubels deur die respondent na sy pakhuis vervoer en daar opgeberg is.'

[The facts in that case are evidently distinguishable from the facts of the present one, where there is evidence as to the circumstances under which the furniture was transported by the respondent to his warehouse and stored there.] (My translation.)

and

'Die feite in die saak van *King's Hall Motor Co v Wickens and McNicol*, 1931 NPD 37, waarna ons ook verwys is, is ook van die feite in die onderhawige geval te onderskei, omdat daar, volgens die uitspraak op bl.45, *hoegenaamd geen getuienis was dat dit in daardie geval, vir die behoud en beskerming van die motor*, nodig was om dit in die garage van Wickens en McNicol te stoor nie.' (My emphasis.)

²⁹ *Brooklyn House Furnishers*, supra 272A.

³⁰ 1927 CPD 198 'Held, that there being no privity of contract between the parties and no express or implied consent by appellant to expense being incurred for the storage of the wardrobe, for the respondent to establish a lien over the wardrobe he had to prove that the storage was a necessary expense; that there was no evidence to show that the appellant had been benefitted or enriched by the storage or that the storage was necessary either to preserve or protect the wardrobe; that the storage was consequently not a necessary expense and the respondent was not entitled to any lien over the wardrobe as against the appellant; that judgment should have been given in the lower court for the appellant; and that the appeal should accordingly be allowed with costs.'

[The facts in the case of *King's Hall Motor Co v Wickens and McNicol*, 1931 NPD 37, to which we have also been referred, are also distinguishable from the facts in the present case, because, according to the judgment on p.45, *there is no evidence in that case, that for the preservation and protection of the car*, it was necessary to store it in the garage of Wickens and McNicol.] (My translation.)

- [40] It is also trite that the affidavits constitute both the evidence and the pleadings in motion proceedings. *In casu*, the onus rests on the respondent to prove that the towing and storage costs incurred in relation to the applicant's vehicles were necessary expenses. It cannot without more be said that the towing of a vehicle is necessarily an act that is necessary to ensure the preservation of such vehicle. The court is, for example, not informed whether the vehicles, before they were towed, were stationary in areas renowned for car-jackings, or burglary, whether the traffic was extremely busy, and whether the vehicles posed a danger to the oncoming traffic, or *vice versa*.
- [41] As a result, there is no evidence before the court indicating that it was necessary for the preservation or safekeeping of the vehicles to tow the vehicles from where they were stationary to the respondent's premises. The need to tow the vehicles for their protection against loss or damage and to prevent their value from decreasing was not established. To word it differently, the respondent failed to make out a case that, 'but for the expenses,' the vehicles would have depreciated or perished.³¹
- [42] The issue relating to the storage costs is dealt with below. It is, however, apposite to emphasise, that the mere fact that vehicles are preserved 'under lock and key with cameras and 24-hour security' does not automatically bring about that the storage of the vehicles was necessary for their preservation and safekeeping. Once again, I must highlight that the court in *Brooklyn House Furnishers* was

³¹ *Naidoo v Sanbonani Express Freight and Another* 2008 (5) SA 530 (D).

convinced by the undisputed evidence, that the storage of the furniture was necessary for its preservation and safekeeping due to the prevailing circumstances.

- [43] The undenied presence of stickers or signs on both vehicles indicating that the vehicles may only be towed by service providers authorised by the applicant is a cause of concern. It might not impact a debtor-creditor's lien, but I am of the view that it is a fact to consider in determining whether the action that was performed and expenses incurred in contradiction with the right holder's instruction pertaining to that specific action (the towing of the vehicle), can be considered as an action necessary to preserve or protect the thing in question that can create a salvage lien. The applicant correctly, in my view, avers that the respondent deals with rental companies in its line of business, and should have been alert to the possibility that the drivers of the respective vehicles might have regarded themselves as the owners of the vehicles, without legally being the owners. The respondent correctly identifies this exact point in relation to the applicant's claim that it was the owner of the vehicles, before the final instalments were paid to Absa Bank and Kia Motors SA Demo Fleet, respectively, and claims that the applicant could not reclaim the vehicles with the *rei vindicatio* before it obtained ownership thereof. Circumstances might arise that justify the towing of a vehicle despite a clear instruction to the contrary, but the necessary facts must be set out for the court to find that the action and related expenses were indeed necessary and that the vehicles would have depreciated or perished had the respondent not acted.

- [44] The respondent's 'Towing Conditions', in a poorly phrased paragraph, provides for the possibility that the 'customer' might not be the owner of the vehicle. Paragraph 10 of the Towing Conditions read:

'The signatory warrants that the customer is the owner of the vehicle, alternatively that the signatory has the customer disputes that the signatory was duly authorised to enter into this Agreement the signatory shall be personally liable for all amount payable to the company and hereby indemnifies the company against all claim arising

from the towing and storage of the vehicle, and acknowledge that he/she may be liable for prosecution.’(sic.)

[45] The storage of the vehicle was not done at the behest of the persons with whom the respondent contracted. The storage costs flow directly from the agreement that the respondent would tow the vehicle to its premises and keep it there until its fees were fully paid.

[46] The respondent kept possession of the vehicles for its own benefit. The applicant submits that a salvage lien can thus not have been established in relation to the storage costs. The applicant relies on *Thor Shipping and Transport SA (Pty) Ltd v Sunset Beach Trading 208 CC*,³² where a Full Bench of the KwaZulu-Natal Division remarked *obiter* that:

‘Assuming it to be arguable that some level of enrichment (and matching impoverishment) arose because the second defendant had his vehicle kept safe without charge for the storage period, the answer to the claim would probably lie in the proposition that a lien-holder keeps possession for its own benefit, as a result of which it is not entitled to claim compensation by way of storage charges.’

[47] Respondent’s counsel, on the other hand, submits that the court is bound to the judgment in *Ford v Reed Bros*,³³ a Full Bench decision from this Division. In *Ford*, the court held that *Wessels v Morice*,³⁴ a judgment relied on in *Thor Shipping*, was wrongly decided on the basis that it was in line with the English law and did not consider the Roman-Dutch law. Counsel submits that the issue as to whether storage fees and the legal costs of enforcing same may be raised as part of the salvage lien, was approved by the Appellate Division, as it then was, in *Brooklyn House Furnishers*.

³² 2017 JDR 1771 (KZP); 9AR664/2016) [2017] ZAKZPHCC 44 (3 November 2017) at para 28.

³³ 1922 TPD 266.

³⁴ 1913 NDP 112.

[48] I agree with the principle set out in *Ford*, where Mason J explained:³⁵

‘For the other proposition that the expenses of exercising a lien fell upon the creditor the cases of *Somes v British Empire Shipping Company* (27 LJQB 397; 8 HLC 338) and *Wessels v Morice* 1913 NP 112 are cited.

The *Natal* case was based upon the House of Lords decision without any apparent examination of the Roman-Dutch authorities, and the English courts, following largely a series of prior cases, adopted the view that a lien was not claimable in respect of these additional expenses because the creditor was retaining possession for his own benefit. I find it difficult to follow the justice of the reason. It is true that these expenses are incurred by the creditor for his own benefit, but if they are an essential accompaniment of the exercise of his right, why should they not follow the general rule? The legal costs of enforcing a mortgage bond or even of a lien are added to and form part of the principal; why should extra-legal costs, equally necessary to the creditor’s, exercise of his rights and generally such as the debtor himself would otherwise have to incur, stand upon a different footing’?

[49] The principle, however, also does not find application in a vacuum. A respondent relying on *Ford*, must first make out a case that a salvage lien arose, before any expenses associated with exercising the lien, can be said to be secured under the lien. *In casu*, the respondent failed to make out a case that the towing costs were necessary expenses incurred to ensure the preservation and safekeeping of the vehicles. Where a salvage lien cannot be said to exist in relation to the towing costs, the subsequent storage costs cannot be claimed from the owner, although it undoubtedly can be claimed from the party with whom the respondent contracted.

[50] In the circumstances, the application stands to be granted. Since the notice of motion reflects that the applicant seeks an order that its attorney of record retains

³⁵ *Ford, supra*, at 269.

the offered security subject to the respondent issuing summons against it within 20 days of this order, and this position is repeated in its practice note, there is no reason not to include this in the order.

- [51] The applicant seeks a punitive costs order to be granted against the respondent. I find it inexplicable that the respondent refused to return the vehicles to the applicant against the payment of security when it was offered. The difference between the security offered and what the respondent regarded due to it was negligible. The question of when a costs order on a punitive scale is warranted was dealt with in *Public Protector v South African Reserve Bank*,³⁶ where Mogoeng CJ noted:

‘Costs on an attorney and client scale are to be awarded where there is fraudulent, dishonest, vexatious conduct and conduct that amounts to an abuse of court process.’

- [52] In *Plastics Convertors of SA on behalf of Members v National Union of Metalworkers of SA and Others*,³⁷ the court stated:

‘The scale of attorney and client is an extraordinary one which should be reserved for cases where it can be found that a litigant conducted itself in a clear and indubitably vexatious and reprehensible manner. Such an award is exceptional and is intended to be very punitive and indicative of extreme opprobrium.’

- [53] I am of the view that costs should follow the result, but I am not inclined to grant a punitive costs order. An aspect that impacts the issue of costs, is the applicant’s erroneous insistence that it was the owner of the vehicles subject to instalment sale agreements and that the vehicle’s financiers were mere ‘title holders’ before the vehicles were fully paid. The respondent is correct that the applicant only became the owner of the respective vehicles on 17 and 25 May 2022. Before those

³⁶ 2019 (6) 253 (CC) at para [8].

³⁷ (2016) 37 ILJ 2815 (LAC) at para [46].

dates, the applicant did not meet the necessary requirements to institute the *rei vindictio*. The applicant is thus not entitled to any legal costs incurred in relation to vehicle 1 before 17 May 2022 and in relation to vehicle 2 before 25 May 2022.

ORDER

In the result, the following order is granted:

- 1. The respondent is ordered to hand over the applicant's vehicles, being a Volkswagen Polo Vivo with VIN Number AAV[...], Engine Number CLP3[...] and registration number JH[...] (vehicle 1) and a Kia Picanto with VIN Number KNABE[...], Engine Number G3[...] and registration number FR[...] (vehicle 2) to the Deputy Sheriff who is authorised and directed to deliver the first motor vehicles to the Applicant;**
- 2. The applicant's attorneys of record continue to hold an amount of R75,817.50 subject to the respondent issuing and serving summons against the applicant within 20 days of the date of this order;**
- 3. The respondent is to pay the costs of the application subject to 4 below;**
- 4. The applicant's bill of costs may not include any costs incurred prior to the respective dates on which it obtained ownership of the two vehicles concerned.**

E van der Schyff
Judge of the High Court

Delivered: This judgement is handed down electronically by uploading it to the electronic file of this matter on CaseLines. As a courtesy gesture, it will be emailed to the parties/their legal representatives.

For the applicant:

Adv. H.P. Van Nieuwenhuizen

Instructed by:

RAEES CHOTIA ATTORNEYS

For the first respondent:

Adv. A.C.J Van Dyk

Instructed by:

TSHABALALA ATTORNEYS

Date of the hearing:

22 August 2023

Date of judgment:

11 September 2023