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IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

Case No. 17108/2022

(1) REPORTABLE: ~~YES~~/NO

(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO

(3) REVISED: NO

DATE: 17 NOVEMBER 2023

SIGNATURE:..

In the matter between:

RANTHAKE, FELICITY N.O

APPLICANT

And

CHELIN, TANYA

RESPONDENT

Coram: Millar J

Heard on: 12 October 2023

Delivered: 17 November 2023 - This judgment was handed down electronically by circulation to the parties' representatives by email, by being uploaded to the *CaseLines* system of the GD and by release to SAFLII. The date and time for hand-down is deemed to be 09H00

on 17 November 2023.

JUDGMENT

MILLAR J

[1] During her lifetime, the late Jeanette Anne McHardy was the owner of 3 horses stabled¹ with the respondent, (Ms. Chelin). Upon Ms. McHardy's passing on 2 August 2021, the applicant (Ms. Ranthako) was appointed as the executor of her estate.

[2] The horses concerned are:

[2.1] Rathmore Valentia (Valentia), a 7-year old chestnut Hanoverian mare with a white blaze and white stock behind as well as one white stocking behind.

[2.2] Rathmore Volare, (Volare), a 7-year old chestnut Hanoverian gelding with a white blaze and four white stockings.

[2.3] Rathmore Lux K Pillango (Lux), an 11-year old light bay KWPN gelding with a white star on his head.

¹ There were a number of horses which do not form the subject of the present proceedings and in respect of whom presumably arrangements satisfactory to both parties were made. There was also another horse, Don, whom Ms. Chelin alleged was co-owned by herself and Ms. McHardy in equal shares. It is common cause that the heirs in the estate of Ms. McHardy waived and renounced their inheritance of the estate's half-share in Don and that Ms. Chelin has accepted this and she is now the sole owner of Don.

- [3] Ms. Ranthako's appointment as executor was confirmed on 27 August 2021. During September 2021, she gave notice to Ms. Chelin of her intention to remove Valentia, Volare and Lux from her stables.
- [4] The ownership of the horses by Ms. McHardy as of 2 August 2021 was not in issue between the parties. A dispute arose between Ms. Ranthako and Ms. Chelin relating to what was due by Ms. McHardy's estate. This dispute seems, in part, to have arisen out of what was said to both incorrect and erratic billing for the costs of stabling and upkeep of Valentia, Volare and Lux.
- [5] In consequence of this dispute, Ms. Chelin initially refused to release any of the 3 horses contending that she was entitled to exercise a lien, and hence the institution of the present proceedings.
- [6] When this application was first brought, Ms. Ranthako sought an order for the unqualified delivery of the 3 horses together with their passports and any other relevant documents relating to them. In the alternative, she sought an order, in the event that it was found that Ms. Chelin had a lien over any one or more of the horses, for an order that the horses be delivered against the furnishing of appropriate security in favour of Ms. Chelin.
- [7] It is apposite to mention that at the time the application was heard, Ms. Chelin sought condonation for the late filing of her answering affidavit and for leave to file further affidavits. Ms. Ranthako has replied. I have considered the reasons for the late filing as well as the contents of the further affidavits and the reply and am of the view that it is in the interests of justice that condonation be granted,² and the further affidavits (and reply) be admitted.³

² *Ferris and Another v Firststrand Bank Ltd* 2014 (3) SA 39 (CC) para [10].

³ *Dickinson v South African General Electric Co (Pty) Ltd* 1973 (2) SA 620 (A) at 628F.

- [8] Insofar as it was argued in the present matter that there are disputes of fact relating to the claim by Ms. Chelin against the estate, these do not muddy the waters of this matter. Those disputes are the subject of a separate action and will be decided by a trial court. By the time this application was heard, Ms. Chelin had already instituted action against the estate for payment of what was said to be due. Accordingly, this Court is not called upon to decide that issue.
- [9] Furthermore, possession of Valentia and Lux had already been given to Ms. Ranthako on 25 March 2023 and they are now stabled elsewhere. The reason proffered for handing the horses over was that the amount expended to preserve the lien did not justify the retention of those horses due to their value and so instead possession was relinquished. Their horse passports, the documents issued to each of the horses, and which need to be presented *inter alia* when they enter shows, are transported from one locale to another or when they are treated by a veterinarian, were however retained by Ms. Chelin, ostensibly to continue exercising her lien.
- [10] In respect of Volare, there is a separate dispute. It is not in issue between the parties that during her lifetime, Ms. McHardy gave a written option in the form of a “right of first refusal” to Ms. Chelin to purchase Volare from her if she ever intended to sell him. The price was the same that she had paid viz €4 000.
- [11] In consequence of correspondence that was exchanged between Ms. Chelin and the late Ms. McHardy’s brother (Mr. Michael McHardy), she was under the impression that the heirs in the estate intended to sell Volare. This was conveyed to her in an e-mail that he had addressed to her on 6 August 2021, only 4 days after Ms. McHardy’s passing. She then pre-emptively sought to exercise her option to acquire ownership of Volare and paid the Rand equivalent of the €4 000 into her attorney’s trust account.

[12] It is not in dispute that at no stage did Ms. Ranthako ever indicate to Ms. Chelin her intention to sell Volare or that Mr. Michael McHardy, whatever his intentions, had no authority to contract for the estate.⁴ Furthermore, during the hearing of this matter, a representative of the heirs in the estate was present (besides the legal representatives) and she informed the Court after being requested to ascertain the attitude of the heirs to the sale of Volare, that they did not want to sell Volare. This is entirely consistent with the stance taken by Ms. Ranthako.⁵

[13] So, the crisp issues to be decided by this Court are:

[13.1] Whether Ms. Chelin was entitled to exercise a lien over the 3 horses, Valentia and Lux until 25 March 2023 and Volare to the present.

[13.2] Whether Ms. Chelin was entitled to exercise or retain a lien over the 3 horses through the retention of “the horse passports” and

[13.3] Whether, subject to the findings of this Court on the issues in [11.1] and [11.2] whether it is appropriate to order the substitution of any lien with a guarantee as security for what was said to be outstanding and the amount thereof.

[14] The parties agreed at the hearing that if the Court found that Ms. Chelin was entitled to withhold the horse passports and/or the horses in the exercise of a lien but that should the court nevertheless order security to be furnished as against the delivery of the passports and Volare, then the appropriate amount of the security to be furnished against the delivery of the passports and Volare is R240 740.34.⁶

⁴ It is only the executor in an Estate who has authority to sell movable assets, see section 47 of the Administration of Estates Act 66 of 1965.

⁵ *Ibid* section 47.

⁶ This amount was calculated, by Ms. Chelin, in respect of the period from September 2021 to mid-November 2021 in respect of each of Lux and Valentia the sum of R17 520.00 i.e. a total of R35 040.00 and then in respect of the period from mid-November 2021 until they were collected in March 2023 the

- [15] This amount is predicated on the amount of the claim of Ms. Chelin in respect of Valentia and Lux. If this Court is to order that Volare be returned against the furnishing of security, then the amount of the claim is likely to change to accommodate the costs relating to Volare from September 2021 to the present.
- [16] It is not in dispute that the late Ms. McHardy was the owner of all three horses. Furthermore, it is not in dispute that in respect of Volare, Ms. Ranthako did not offer to Ms. Chelin the opportunity to exercise the option to purchase. It is trite that it is the executor of an estate that is clothed with the authority to attend to its administration and not the heirs.
- [17] The starting point is thus, that the estate has at all times and to the present, been the owner⁷ of all 3 horses and their passports. Furthermore, they (and their passports) were all in the possession of Ms. Chelin and she was the one who was contractually responsible for their upkeep. Accordingly, the lien she exercised was a contractual or debtor/creditor lien.
- [18] In *The Law of Property*, this is explained as follows – “*contractual liens are so named because the lien, although coming about by operation of law, exists to secure a debt that was created on the basis of a contractual relationship between the parties. Although this can occur in many different situations where one person is contracted to do certain work with reference to property,*” and in the examples referred to specifically – “*An agistor [a person who provides grazing] has a lien for grazing fees and fodder supplied in respect of animals*

sum of R102 850.17 each i.e. R205 700.34. The total for the entire period until they were collected is R240 740.34. There have been guarantees tendered over the period from Ms. Ranthako's appointment but none of these have been acceptable to Ms. Chelin. since they were for less than 10% of her claim.

⁷ *Chetty v Naidoo* 1974 (3) SA 13 (A).

*under his or her control, as does a livery stable-keeper for the food and keep of horses entrusted to him or her.”*⁸

[19] In *Pheiffer v Van Wyk and Others*⁹ it was held that:

“The possessor of the property who has a debtor/creditor lien is not required to relinquish possession until such time as the full contractual amount is paid to him. A debtor/creditor lien is not a form of real security. It is based upon a contract and extends to all expenditure which the lien holder has incurred upon the property in terms of a contract, express or implied, with another party. A lien holder may retain the property as against the contracting party (but not against third parties) until he has been compensated for the work and costs incurred. This lien does not exist apart from the contract and can be a defence to any vindicatory action.”

[20] In regard to horses in particular, in *Ford v Reed Bros*¹⁰ the position was succinctly stated as follows:

“The plaintiff cannot get the horses unless he is prepared to pay the expenses incurred in keeping the horses alive.”

[21] However, *“A lien is lost for the same reason as other rights of security, for example if the debt is paid or otherwise discharged, or as the result of a merger or the total destruction of the property. A lien is also lost if the holder relinquishes his or her possession of the property or otherwise waives his or her*

⁸ Silberberg and Schoeman’s, 6th Edition, Lexis Nexis, 2019 at 490.

⁹ 2015 (5) SA 464 (SCA) para [11].

¹⁰ 1922 TPD 266 at 278. The court went on to refer old authority – *“Voet (20.3.4), says that an owner’s, consent to the mortgage of his property can be implied. An owner when he entrusts a horse to another for any length of time and for any distance knows that the horse must be fed, otherwise the animal would perish, and if the bailee does not or cannot pay, he as the owner must pay.”*

*right, either expressly or by implication — that is, by conduct which is inconsistent with his or her claim.”*¹¹

[22] The position is however not absolute. In *Spitz v Kesting*¹² it was held that:

“Even where the claim in respect of which the jus retentionis [right of retention] 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 own 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 claimants’ recovery of expenses.”

[23] In the present matter, while Ms. Chelin relinquished possession of Valentia and Lux, she kept possession of their passports. While there is no doubt that she was entitled to exercise a lien over the horses themselves, can it be said that such a lien extends to their passports? It was argued on her behalf that the passports are analogous to the key for a motor car or the key to a building. In the case of the passports, the horses cannot be entered into competitions or moved from one locale to another and it would not be possible to demonstrate what vaccinations the horses had had.

[24] An owner without a horse, while deprived of the ability to enter the horse into competitions or move it around the country and/or abroad without the passport is, nevertheless, able to exercise full control over it and to use it. The control is over the horse. In the case of a motor car or a locked building, a key is the means by which possession and control is exercised – it is not possible to drive a motor car without its key and it is not possible to enter a locked building

¹¹ *Ibid* The Law of Property page 493-4.

¹² 1923 W.L.D 45. See also *Hochmetals Africa (Pty) Ltd v Otavi Mining Co (Pty) Ltd* 1968 (1) SA 571 (A), *Mancisco & Sons CC (in Liquidation) v Stone* 2001 (1) SA 168 (W) at 174G-H.

without a key. In the case of a horse, this can nonetheless be ridden without a passport and on this singular aspect, it seems to me as a matter of common sense, that the passport plays no role in either the possession or the use of the horses.

- [25] For this reason, I find that Ms. Chelin was not entitled to exercise a lien over the horse passports for Valentia and Lux. When she relinquished possession of them, she relinquished her lien and ought to have handed the passports to Ms. Ranthako at that time.
- [26] This is however not the end of the matter as in respect of Volare, Ms. Chelin has maintained possession and control over this horse. Her possession of the passport in respect of Volare, as with both Valentia and Lux, was an adjunct to the contract entered into between her and the late Ms. McHardy, to not only stable and care for her horses but also to ride them and to enter them into shows. She needed the passports in order to enter them into shows and to transport them to and from shows. The passports were furnished to her for a purpose other than the one in respect of which her claim against the estate arises. For these reasons I intend to order Ms. Chelin to furnish the passports for Valentia and Lux to Ms. Ranthako.
- [27] The lien in respect of both Valentia and Lux was relinquished in consequence of what Ms. Chelin regarded as their value as security for what was owed to her having decreased below what was owed and the further and ongoing costs that would have to be incurred in preserving them pending the resolution of her dispute with the estate. The same consideration must, it seems to me of necessity, apply in respect of Volare. It is unknown how long it may take for the pending action instituted by Ms. Chelin to come before court and to be finally decided and all the while, the value of Volare is decreasing while there is an ongoing cost to maintain him.

- [28] Ms. Ranthako has at all times tendered security for the claim of Ms. Chelin against the delivery of the horses to her. Initially, the amounts tendered by her were in the sums that she had determined were due and not commensurate with what Ms. Chelin had claimed were due. This is where the dispute arose in 2021 and it is now 2023.
- [29] I am persuaded that it is in the interests of all parties that Ms. Chelin be ordered to deliver Volare and his passport to Ms. Ranthako against the furnishing of a guarantee. The parties agreed that if I were to order this, that the guarantee should be in the sum of R240 740.34.
- [30] In regard to costs, both parties sought punitive costs in the event of a finding in their favour. The litigation between the parties has clearly been acrimonious. While Ms. Chelin was entitled to retain possession of the horses and their passports in the exercise of her lien over them, it is unclear why Ms. Ranthako cognizant of the fact that she could tender security against the return of the horses, did not tender adequate or appropriate security.
- [31] A further troubling feature in this matter is what happened in the days immediately following Ms. McHardy's passing. While Mr. McHardy, her brother, who is not an heir in the estate may well have thought that he was acting in the best interests of the heirs, Ms. Chelin for her part well knew that neither he nor the heirs could bind the estate and that only the executor could. In a letter dated 21 August 2021, before the appointment of Ms. Ranthako, Ms. Chelin's erstwhile attorney confirmed as much.
- [32] In the circumstances it is inexplicable why, even before this Court, that Ms. Chelin would persist with the argument that she had validly exercised her option for the purchase of Volare.

[33] The award of costs is a matter that is entirely within the discretion of the Court. For the reasons that I have set out above, I am of the view that neither of the parties merit an order for costs in their favour. Both played a role in bringing what could and should have been resolved outside court, to court. This was entirely avoidable and unnecessary in my view. For this reason, I do not intend to make any order for costs.

[34] In the circumstances, I make the following order:

[34.1] Subject to the Applicant first delivering a guarantee in the form attached to the Notice of Motion in the sum of R 240 740.34 in substitution of the lien exercised by the Respondent, the Respondent is ordered to deliver to or make available for collection by the Applicant within 5 days from date hereof at Portion 9[...] M[...] Road, Sunvalley, Blue Hills, Knopjeslaagte, Midrand, Gauteng - Rathmor Volare, a seven (7) year old chestnut Hanoverian gelding with a white blaze and four white stockings.

[34.2] The Respondent is ordered to deliver to or make available for collection by the Applicant within 5 days from date hereof the passports and any other relevant documentation of proof ownership in respect of the horses Rathmor Volare, Rathmor Lux K Pillango and Rathmor Valentia.

[34.3] There is no order as to costs.

A MILLAR
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

HEARD ON:	12 OCTOBER 2023
JUDGMENT DELIVERED ON:	17 NOVEMBER 2023
COUNSEL FOR THE APPLICANT:	ADV. T CHAVALALA
INSTRUCTED BY:	RANTHAKO ATTORNEYS
REFERENCE:	MS. F RANTHAKO
COUNSEL FOR THE RESPONDENT:	ADV. R BOSMAN
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