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REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
(LIMPOPO DIVISION, POLOKWANE)

- (1) REPORTABLE: YES/NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED

CASE NO: 2882/2019

23/1/2020

In the matter between:

ANDRE STEENKAMP

APPLICANT

and

BRADBURY'S COMMERCIAL AUTO BODY CC

RESPONDENT

JUDGMENT

MAKGOBA JP

- [1] In this application, the Applicant seeks an order directing the Respondent to deliver to the Applicant certain motor vehicle, 2011 Toyota Land Cruiser Prado VX 3.0 040 with registration number [...]. ("The Vehicle") The Respondent, being in possession of the vehicle, opposes the application on the basis that it has a debtor-and-creditor lien alternatively an enrichment (improvement and salvage) lien over the vehicle.
- [2] The Applicant's case is essentially that it will be entitled to the return of the

vehicle under the following circumstances:

- 2.1. where the Respondent has no lien over the vehicle vis-a-vis the Applicant; and
- 2.2. where the lien has been destroyed through loss of possession by the Respondent.

Factual Background

- [3] It is common cause that the vehicle was insured with Nzalo Insurance Limited ("Nzalo"). The vehicle was involved and damaged in a collision on 11 March 2018. The Applicant submitted a claim for repairs to the vehicle to Nzalo via his insurance brokers, Libra Vitae Finance Management CC, which claim was approved by Nzalo. Nzalo arranged for the vehicle to be towed to the Respondent which conducts business as a panel beater in Polokwane. The Respondent prepared a quotation for the repairs to the vehicle and forwarded the quotation to Nzalo for authorization to repair. Nzalo appointed an assessor to inspect the vehicle at the Respondent and the Respondent received an authorization letter to repair the vehicle from the assessors, acting on behalf of Nzalo.
- [4] The vehicle was repaired by the Respondent and released to the Applicant on 13 June 2018, after he had paid the excess of R 3 000.00 to the Respondent. The Respondent gave a warranty / guarantee in respect of the repairs effected to the vehicle. The Respondent issued a tax invoice in respect of the repairs costs for an amount of R 304 832.21 to Nzalo on 7 August 2018.
- [5] The Applicant took the vehicle back to the Respondent on 1 October 2018 in order to have the air-conditioner fixed under the warranty / guarantee. This was after almost three months since the vehicle was released to the Applicant on 13 June 2018. When the Applicant followed up on the repairs of the air- conditioner on 4 October 2018, he was informed by the Respondent that Nzalo did not pay for the initial repairs on the vehicle and that it will not release the vehicle until it gets paid what is owing to it for the

initial repairs on the vehicle.

- [6] Nzalo was placed under provisional curatorship on 6 November 2018 and was apparently liquidated thereafter.

Issues for Determination

- [7] The issues between the parties appear to me to be the following and fall to be decided against the factual background which I have set out above:
- 7.1. Whether the Respondent has a right of retention (lien) in respect of the costs of repairs on the vehicle and storage charges.
 - 7.2. Whether the Respondent has shown an agreement, expressly or impliedly, to revive the lien which it had in respect of the repairs effected to the vehicle and which it lost when the possession of the vehicle was given back to the Applicant on 13 June 2018.
 - 7.3. Whether it is possible, in law, so to revive a lien which has been lost.

The Law

- [8] 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 1906 TS 623 at 627-628**. Liens are generally divided into debtor-and-creditor liens on the one hand and enrichment liens on the other hand.
- [9] 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 1965 (2) SA 525 (A)**.

[10] In **D Glaser & Sons (Pty) Ltd v The Master and Another N.O 1979 (4) 780 (CPD)** it was held that a builder, by virtue of his contract, and by virtue of having put money and money's worth into his debtor's property, can have two liens, 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.

[11] 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 there was no contractual arrangement between the parties in respect of the expenses.

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

Harms, Amler's Precedents of Pleadings, 9th Edition p 249.

[12] 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 **D Glaser & Sons (Pty) Ltd** supra.

[13] 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 threat of force or where he or she parts with possession as a result of fraud. It is trite that loss of possession destroys a lien, and the lien cannot be revived by recovery of possession. The lien does not automatically revive if the lien holder relinquishes his or her possession and subsequently regains it - **Oceana Leasing Services (Pty) Ltd v B G Motors (Pty) Ltd 1980 (3) SA 267 (W)**.

[14] In **Marinus v Taljaard 1952 (1) SA 49 (CPD)** it was held that once a tacit right of retention is lost consequent upon the creditor's voluntary surrender of possession, the lien is thereby destroyed and it does not, in the absence of further tacit or express agreement revive merely upon the article's coming again into possession of the creditor.

See also **Muller and Another NNO v Bryant & Flanagan (Pty) Ltd 1976 (3) SA 210 (D) at 220**

and

Randalia Bank Bpk v Pieter Nel Motors (Edms) Bpk 1979 (4) SA 467 (T) at 470.

Claim for Storage Costs

[15] The Respondent contends that the Applicant is liable for storage costs in the amount of R 101 027.50. Reliance in this regard is placed upon a tacit agreement that the Applicant would pay storage charges if he failed and / or refused to effect payment of the invoice amount in respect of the repairs.

[16] The Applicant was first confronted with the storage costs in the Respondent's answering affidavit. The invoice for the storage costs was only issued subsequent to service of the present application. There is no averment in the Respondent's papers that the amount of R 350.00 per day

was agreed upon or that it constitutes the usual or normal storage costs for the vehicle. In my view, if there was indeed any agreement, express or tacit, that storage costs would be charged by the Respondent, it was to be expected that the Respondent would have issued invoices for storage costs on a monthly or at least a quarterly basis. It is improbable that the Applicant would have contracted on such basis, moreso that the Applicant disputed the liability for payment of the repair costs as per an invoice issued to Nzalo on 7 August 2018.

[17] The reliance on a tacit contract for storage costs is clearly an afterthought on the Respondent's part. In the absence of agreement on the storage costs there can be no contract between the Applicant and the Respondent. The Respondent has thus failed to prove a tacit contract for storage costs. It follows that the Respondent is not entitled to exercise any lien vis-a-vis the Applicant.

[18] Even if I were to make a finding that the Respondent was entitled to exercise a debtor and creditor lien, the Respondent would still not be entitled to storage costs. It is trite that any person exercising a lien is not entitled to any storage costs merely for keeping the property on his premises. The following was stated in **Thor Shipping and Transport SA (Pty) Ltd v Sunset Beach Trading 208 CC 2017 JDR 1771 (KZP)** at para [28]

*"As to the enrichment claim, counsel for the plaintiff made no submissions in support of it. 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. (See in this regard the full court decision in *Wessels v Morice* (1913) 34 NPD 112; and *Laingsburg School Board v Logan* (1910) 27 SC 240.)". (My underlining)*

- [19] In the light of the authority cited above I still hold that the Respondent thus also has no salvage lien in respect of the storage costs of the vehicle.

Claim for Repairs Costs

- [20] The Respondent purports to exercise a debtor and creditor lien against the Applicant in respect of the repair costs of the vehicle now that Nzalo has failed to pay the amount of R 304 832.21 as per the invoice dated 7 August 2018. The Applicant contends that the retention and possession of the vehicle by the Respondent is unlawful as any lien which the Respondent might enjoyed in respect of the repairs done to the vehicle was destroyed when the Respondent returned the vehicle to the Applicant on 13 June 2018 and that the subsequent delivery of the vehicle to the Respondent on 1 October 2018 did not and could not revive the lien.
- [21] The Applicant's contention is correct in the light of the authorities I have referred to in paragraphs [13) and [14] hereinabove. I am of the opinion, therefore, that there is no justification of any grounds for the Respondent to withhold possession of the vehicle from the Applicant.
- [22] The Applicant will be entitled to return of the vehicle if any lien which the Respondent might have had over the vehicle was destroyed. In the present case it is not the Respondent's case that the vehicle was released under threat of force or through fraud when same was handed over to the Applicant on the 13 June 2018. It is also not the Respondent's case that the lien was revived by way of an agreement with the Applicant on the 1 October 2018.
- [23] The vehicle was released to the Applicant on 13 June 2018 after payment of the excess amount of R 3000.00 had been made. The release note (Annexure BC 8 to the Answering Affidavit) does not contain any provision reflecting a conditional release of the vehicle. It is common cause that the vehicle was returned to the Respondent on 1 October 2018 for repairs of an air- conditioner under warranty and for no other reason. Had it not been for the required repairs to the air-conditioner, the vehicle would not have

been returned to the Respondent.

[24] It is interesting to note that the Respondent never requested the Applicant to return the vehicle prior to 1 October 2018 in order to exercise its lien over it pending payment. I agree with the submission made by Counsel for the Applicant that the alleged "revival" of the lien was a mere windfall for the Respondent as it is by no means clear how it would have recovered possession of the vehicle otherwise.

[25] Reverting to the facts of the present case. As I have shown above, there is no room whatsoever for any suggestion that the vehicle was handed to the Respondent on 1 October 2018 upon any understanding that the previously existing lien should revive. The Respondent thus lost any lien it might have had over the vehicle when it was released to the Applicant on 13 June 2018.

[26] I accordingly hold that the purported lien was lost when the vehicle was returned to the Applicant on 13 June 2018 and that there was no revival of that lien when the Respondent subsequently re-acquired possession of the vehicle on 1 October 2018. In the premises the Applicant is entitled to the relief sought.

[27] The conclusion thus reached renders it unnecessary for me to give any decision regarding the issue whether there is any debtor and creditor contract between the Applicant and the Respondent or between the Respondent and Nzalo, which gave rise to a debtor-and-creditor lien in respect of the repair costs of the vehicle.

[28] I accordingly grant the following order:

28.1. The Respondent is ordered to immediately return to the Applicant the motor vehicle, 2011 Toyota Land Cruiser Prado VX 3.0 D4,D registration [...], engine number IKD2068846 and vehicle identification number **(VIN)** JTEBH3FJ80K044105.

28.2. The Respondent is ordered to pay the costs of this application on a party and party scale.

**EM MAKGOBA
JUDGE PRESIDENT OF THE
HIGH COURT, LIMPOPO
DIVISION, POLOKWANE**

APPEARANCES

Heard on : 9 December 2019

Judgment delivered on : 23 January 2020

For the Applicant : Adv. R Grundlingh

Instructed : Joubert & May Attorneys

For Respondent : Adv. A Botha

**Instructed Van Heerden & Krugel Attorneys
c/o Franco Marx Attorneys**