

Reportable:	YES/	NO
Circulate to Judges:	YES/	NO
Circulate to Magistrates:	YES/	NO
Circulate to Regional Magistrates:	YES/	NO



HIGH COURT OF SOUTH AFRICA
[NORTHERN CAPE HIGH COURT, KIMBERLEY]

Case No: **1030/16**

Heard: **21-06-2016**

Delivered: **24-06-2016**

In the matter between:

KATSHESA ENGINEERING SERVICES CC

Applicant

v

DESMOND TM RELANE

Respondent

JUDGMENT

Kgomo JP

1. The applicant, Katshesa Engineering Services CC, is a close corporation which is duly registered and incorporated in accordance with the laws of the Republic of South Africa, with its principal place of business situated at Office UP3, Montana Gables, Escallonia Street, Montana, Pretoria, Gauteng Province.

2. The applicant seeks against the respondent, Mr Desmond TM Relane, an adult male of No [...] D. S., A. P., Kimberley, Northern Cape, the return and delivery of a Ford Ranger vehicle with Engine number WLAT1212175; Chassis number AFARXXMJ2RAR02291 and Registration number [B....] and 38 other valuable tools of the trade and equipment, with a replacement value of about R500 000.00 and current value of over R300 000.00, belonging to it which, despite demand, the respondent stubbornly refuses to restore. This is therefore a vindicatory application.
3. The applicant employed the respondent as a permanent employee on 11 May 2015 as a project manager pursuant to a mandate acquired from the Airport Company of South Africa (ACSA) to attend to certain landside infrastructure upgrade at Kimberley Airport. He would report directly to the applicant's Chief Operations Officer (COO). His monthly salary was R25 000.00. There are other peripheral terms and conditions, which need not be gone into for present purposes.
4. The applicant alleges that it was at all material times its intention, and so understood by the respondent, that the use and possession of the vehicle and the tools and equipment shall only be utilized for purposes of and for the duration of the respondent's employment with the applicant. It was furthermore understood between the parties that the respondent shall be liable to return the vehicle and the tools and equipment in the same good condition they were received in, taking reasonable wear and tear into account, at the termination of the respondent's employment.
5. The applicant makes the averment that the further Kimberley Landside Infrastructure Project (KLIP) was running behind schedule and upon investigating the situation, it came to its attention that the respondent clocked in for work in the mornings, dropped off

the employees working under him at the appropriate site and disappeared until closing time whereafter he put in a few working hours to enable him to charge the applicant for overtime. It was therefore clear to the applicant that the reason for the overtime hours was self-created by the respondent as he did not put in the normal working hours he was supposed to in accordance with his employment contract. It was also clear that he was intentionally prolonging the project in order to secure his employment for a longer period.

6. When the situation was taken up with respondent, he reacted by requesting payments never agreed on and claimed undeserved overtime payments. On 31 March 2016 a Notice of Termination was handed to him in terms of which his employment was terminated and called upon to return all company assets including the motor vehicle, tools and equipment, set out in the Notice of Motion, all of which has been in his possession at all relevant times.
7. The respondent wrote back to the applicant and acknowledged being in possession of the vehicle and the other mentioned articles but claimed a right of retention or a lien to the property. It is common cause that the assets belong to the applicant. In any event, the applicant has furnished documentary proof of such ownership and has accordingly established a clear right as far as interdictory relief is concerned.
8. The respondent drew up his own Answering "*Notice of Response to Affidavit*" which has not been attested or commissioned and is thus, ordinarily, fatally flawed. It is therefore not surprising that a point *in limine* was taken by Adv Jankowitz, for the applicant in this regard. See: **Nkondo v Minister of Police** 1980 (2) SA 362 (O) at 365; and **S v Munn** 1973 (3) SA 734 (NC).

However, I will overlook this flaw for the following reasons:

- 8.1 The respondent is a lay-person, not legally qualified and drew up his own response. He has tried to ventilate something for the consideration of the court;
 - 8.2 When he appeared before me in person on 14 June 2016 he pleaded impecuniosity (lack of finances/poverty). I requested Legal Aid South Africa, Kimberley, to come to his rescue and postponed the application to 21 June 2016. Mr Sampson of LASA has kindly obliged. I thank him for his assistance at short notice.
 - 8.3 Applicant has taken his point *in limine* belatedly, after it has already filed a Replying affidavit in which it has itself, inter alia, purged its lack of *locus standi* by filing a resolution to bring the application. Prior to filing its Replying Affidavit the applicant should have brought a substantive Rule 30 of the Uniform Rules of Court application alleging an irregular proceeding. A further step has now already been taken.
 - 8.4 It is preferable to bring this matter to finality because all issues have been ventilated.
 - 8.5 This indulgent approach does not constitute any precedent.
9. The respondent, as pointed out stated, drafted his own “*Notice of Response to Affidavit*” and stated **(The numbering and paragraphing is mine)**:
- “(a) *During winding down or final stages of the project, we reminded the company of outstanding payments and a scoop of other legal issues not met. These range from overtime and extra work we have not been assigned for, weekend overtime, labour issues with regards to UIF and other benefits as employees of the company, as contained in the Labour Act – Employment Equity Bill.*
- (b) *Although correspondence has been sent to them, they tend to ignore it; there was a pile-up of issues and questioned the company’s ability to interpret the law accordingly, we even doubted*

whether they have a policy as a guideline to address employee grievance whatsoever.

(c) The other reason why we have decided to keep the vehicle as a retainer was to create a platform to be heard seeing that no response was received from our employers, and that the company doesn't have an office in the Province nor the area where they conducted their services (Kimberley Airport). We became the face of the company. The vehicle was stored at my residence as mentioned above for the past nine (9) months since my involvement at the Kimberley Landside Infrastructure Upgrade Project. The vehicle was lawfully given to me for use, and no conditions were made on where and how to use it. We are fully aware that the vehicle was traced by the Fleet Manager of some kind; until we learned the vehicle was traced by Netstar, who told us they are tracing it as instructed by the owner. We explained that we will co-operate with them but would not give them the keys. We expected the company to come to retrieve the keys from me, as they gave it to me.

(d) After numerous attempts to --- bring issues to the company's attention; and the letter of demand send, I think the company was trying to disappear without notifying or perhaps not address those issues.

(e) Having had numerous calls from sources of applicant including their legal representatives, whose names have been submitted in the application, the issues regarding the retained vehicle became highlight. To me it appeared that applicant was trying to enforce the law instead of addressing me as their employee who has grievances that they are aware of."

10. Evident from the above is that the respondent has no right of retention or lien to the assets of the applicant and its continued possession thereof is unlawful and prejudices the applicant in its

ownership. My views are based on the following requirements for a lien to be successfully invoked. See Amler's Precedents of Pleadings, 7th Ed, Liens p262:

“Salvage and improvement liens: *These liens provide dilatory defences against a rei vindicatio. If successfully raised, the owner may not recover possession of the property from a person who is lawfully in possession and who has an underlying valid enrichment claim, unless and until the defendant has been compensated.*

Singh v Santam Insurance Co Ltd [1997] 1 All SA 525 (A), 1997 (1) SA 291 (SCA)

To rely on a lien the defendant must allege and prove:

(a) *lawful possession of the object;*

Roux v Van Rensburg [1996] 3 All SA 499 (A), 1996 (4) SA 271 (SCA)

(b) *that the expenses were necessary for the salvation of the thing or useful for its improvement;*

(c) *the actual expenses and the extent of the enrichment of the plaintiff (both have to be given because the lien covers only the lesser of the two amounts);*

Rhooe v De Kock and another [2013] 2 All SA 389 (SCA), 2013 (3) SA 123 (SCA)

(d) *that the plaintiff's enrichment is iniusta (unjustified); and*

(e) *that there was no contractual arrangement between the parties (or a third person) in respect of the expenses.*

Brooklyn House Furnishers (Pty) Ltd v Knoetze & Sons [1970] 3 All SA 332 (A), 1970 (3) SA 264 (A)

Buzzard Electrical (Pty) Ltd v 158 Jan Smuts Avenue Investments (Pty) Ltd [1996] 3 All SA 1 (A), 1996 (4) SA 19 (SCA)

McCarthy Retail Ltd v Shortdistance Carriers CC [2001] 3 All SA 236 (A), 2001 (3) SA 482 (SCA).”

11. Mr Jankowitz raised another point *in limine*. That the respondent's purported "*Answering Affidavit*" is not an affidavit in that it has not been attested or commissioned. I have disposed of that issue in para 8 above. On the other hand Mr Sampson raised a point *in limine* that the applicant lacked *locus standi*. This issue has been dealt with in para 8.3 (above). The lack of urgency that Mr Sampson also raised is a non-issue really and has been overtaken by events. As far as the merits are concerned Mr Sampson conceded, fairly, that the respondent is dead in the water.

12. The respondent has invoked the wrong remedy to hang onto the applicant's assets and by so doing has, in a sense, taken the law into his own hands. Prolonging this matter will only mulc him in further legal and perhaps other costs which, it seems, he can ill-afford.

13. The application succeeds. I make the following order:
 1. The respondent, Mr Desmond T M Relane, is ordered to deliver forthwith the motor vehicle described as a **FORD RANGER** with engine number: **WLAT1212175** and chassis number: **AFARXXMJ2RAR02291** and registration number: **[B....]** to the Katshesa Engineering Services CC at Kimberley Airport failing which the Sheriff is directed to take possession of the vehicle and the assets listed in para 2 (2.1 – 2.38 (below) and deliver same to the applicant.

 2. Deliver of the following tools and equipment to the applicant:
 - 2.1 x1 Air Conditioner;
 - 2.2 x2 Mobile Trolly Containers;
 - 2.3 x2 Grinders;
 - 2.4 x1 First Aid Toolbox;
 - 2.5 x1 Wheelbarrow;

- 2.6 x1 Spade;
- 2.7 x1 Pickaxe;
- 2.8 x1 Hosepipe;
- 2.9 x1 Red Toolbox;
- 2.10 x1 Measuring tape (100 metres);
- 2.11 x1 Pop-Rivit Gun;
- 2.12 x2 Wire Fencing Tools;
- 2.13 x4 Brooms;
- 2.14 x2 Dead Levels;
- 2.15 Riot Tools;
- 2.16 All Generators;
- 2.17 X2 Rakes;
- 2.18 X1 Large Grinder;
- 2.19 All Bolsters Tools;
- 2.20 All Chalk Liners;
- 2.21 X2 Earcover Buds;
- 2.22 X2 Fire Extinguishers;
- 2.23 X2 Welding Machines;
- 2.24 X2 Helmets;
- 2.25 X2 Mqala's (Crowbars)
- 2.26 X8 Trowels and Trestles;
- 2.27 X1 Stepladder;
- 2.28 X3 Brick Joinders;
- 2.29 X2 Electrical Extensions (100 metres)
- 2.30 X2 Safety Hangers;
- 2.31 X10 Chisels;
- 2.32 X2 Flags;
- 2.33 X4 Cones;
- 2.34 X1 Hammer Pound;
- 2.35 X10 Measuring Tapes (10 Metres);
- 2.36 X2 Tongs;
- 2.37 X1 Ten Pound Hammer;
- 2.38 X1 Makita Drill Set.

3. The respondent is ordered to pay the costs of this application on the scale as between party and party.

F DIALE KGOMO
JUDGE PRESIDENT
Northern Cape High Court, Kimberley

Counsel:

For the **Applicant:**

Instructed by:

Adv D.C Jankowitz

Duncan & Rothman Attorneys

For the Respondent:

Instructed by:

Mr B Sampson

Legal Aid South Africa, Kimberley