

**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, MTHATHA)**

Not Reportable
CASE NO. 2021/2023

In the matter between:

OLD MUTUAL INSURE LIMITED
Registration number: 1970/006619/06

Applicant

and

SAIDER TOWING SERVICE CC
Registration number: 2008/029794/23

Respondent

EX TEMPORE JUDGMENT

KUNJU AJ:

A. Introduction

[1] Risky as it is, this litigation is a necessary one for the applicant. Risky because the value of the damaged vehicle and its status are unknown by the applicant. A necessary litigation because the applicant does not believe that the towing charges claimed by the respondent are reasonable and it being the owner of the vehicle, it needs it to its possession.

[2] On the other hand, respondent, implicit in its conduct is the invocation of *quid pro quo* doctrine.

[3] At the centre of it all is the right of lien. The issue is less about its existence but more about whether the security that has been tendered is adequate to defeat the lien. In the main, the horns between the parties are locked on this aspect of the case.

[4] For proper appreciation of the facts, it is necessary that I write this judgment following these headings: (a) truncated background, (b) contention of the parties, (c) discussion, and (d) conclusion.

[5] I hasten to do so below.

B. Truncated background

[6] Old Mutual and Ms D. T. Rodolo had concluded a short term insurance agreement in respect of a vehicle morefully described as Hyundai i20, registration no. J[...], **VIN** number M[...] engine number G[...] (the insured vehicle). Ms Rodolo was the owner of the car at the time.

[7] On 7 March 2023 in the evening the insured vehicle was involved in an accident on R61 Dangwana Area on the road between Port St Johns and Lusikisiki, both being towns falling within the jurisdiction of this court.

[8] The insured vehicle was towed away by the respondent's towing truck and was kept at its storage place situated at Genvale Location, Port St Johns.

[9] A settlement or loss of the claim was signed between Old Mutual and Ms Rodolo (Ms Rodolo). Subsequently, the applicant's representative and the respondent spoke and in turn, an invoice for the alleged services of the respondent was dispatched to the applicant. Subsequent to receipt of the invoice, the applicant vehemently contested the charges as unreasonable and inflated. The respondent in turn maintained as he still does, that it is reasonable.

[10] Applicant sent correspondence to the respondent dated 3 April 2023. In pertinent parts the following is stated:

“4 Please note that our client disputes that the amount of R18 112.50 is due and payable to yourselves. After careful consideration of towing gate, administration, recovery and storage fees to be charged in terms of industry norms, our client is of the view that an amount of R8 780.25 constitute a fair and reasonable amount.

. . .

6 In the premises, our client offers to pay the amount of R8 780.25 to release the vehicle to our client. Attached as annexure “C” a breakdown of the charges that our client paid. Our client is further prepared to set security for balance of your alleged claim. We request that in light of the foregoing that the vehicle be released immediately.

7 . . . We furthermore confirm that we hold the balance (R9 332.25) on trust as security pending institution of an action by you within 30 (thirty) days for payment of whatever the amount you believe are owing.

8 We urge you to reconsider your position and to accept our client’s tender of security and payment in the amount of R8 780.25. . . ”

[11] In response to the above email, a very short response which appears to be somewhat aggressive was written. In relevant parts it reads:

“Kindly be informed that your client’s car will not be released until the amount referred to in the invoice is paid in full.

Take further notice that the storage fee will accumulate accordingly.

We further advise you that any application in court will be defended.”

[12] The culmination of the above exchange of correspondence was the institution of this application. The most relevant parts of the notice of motion are stated hereunder:

“1. The respondent is ordered to release a HYUNDAI I20 motor vehicle with registration letters and numbers J[...], VIN number M[...] and Engine number G[...] (“the Motor vehicle”) to the applicant’s nominated representative within 24 hours of the service of this order.

3. The applicant having made payment to the respondent in the amount of R8 780.25, and the balance of the respondent’s invoice, being an amount of R9 332.25 having been paid into the applicant’s Attorneys trust account, shall pay the further storage charges (calculated at R350.00 per day from 03 April 2023 until the date upon which this order is granted) into the trust account of the applicant’s attorneys within 5 (five) days of the service of this order to be retained as security pending the final resolution of any legal proceedings to be instituted by the respondent within 30 (thirty) calendar days of the service of this order to claim its legal fees for the towing, storage, recovery, administration and security in respect of the vehicle;

4. Should the respondent fail to institute legal proceedings contemplated in paragraph 3 above within 30 (thirty) calendar days after the service of this order, an amount paid into the trust account of the applicant’s attorneys shall be released to the applicant.”

[13] The application was served and filed on 11 May 20223. When the matter was not opposed attempts to secure a judgment by default on 6 June 2023 were thwarted by the respondent’s delivery of its notice to oppose on 30 May 2023, few days before the hearing date. On 6 June 2023 it is recorded that the application was removed from the roll and the respondent was directed to pay the costs occasioned by the removal of the matter.

C. Applicant’s contentions

[14] The applicant contends that regard given to the principles of lien:

[14.1] the court has a power to order delivery of the insured vehicle to the owner against adequate security being furnished;

[14.2] the security need not cover the costs of a possible action by the lien holder since the security is regarded as a mere substitution for the lien and not as an additional security;

[14.3] where security is tendered, guaranteed the full amount of the respondent's claim, including further storage, that is sufficient, and the return of the vehicle ought to be ordered;

[14.4] the court should concern itself with the adequacy of the security not whether the respondent was authorised to tow the insured vehicle or not; and

[14.5] the security tendered covers the claim of the respondent including future storage costs of the order.

D. Respondent's contentions

[15] That a contract for the towing of the insured vehicle was concluded between the applicant and Ms Dorcas Tabita Rodolo through a telephone discussion. The terms of the agreement were:

[15.1] The respondent would tow the vehicle as was requested by Ms Rodolo. A call out charge of R4 500.00, recovery fee of R500.00 per every fifteen minutes, gate storage of R500.00, the administration fee at a rate R350.00 a day as well as a value added taxed prescribed by law were levied to be charged. He contends that Ms Rodolo agreed. In that way a verbal agreement was concluded.

[16] He contends that the vehicle is in possession of the respondent by virtue of the said terms of the agreement. It will be released once the full amount is paid as agreed between the respondent and Ms Rodolo. He also acknowledges in paragraph

6 of the heads of argument that the insured vehicle is now owned by the applicant consequent to the transfer thereof prior to the institution of this application.

[17] He contends that his refusal to release the vehicle is informed by the verbal agreement she concluded with Ms Rodolo and he relies on the principles of contract such as *pacta sunt servanda* (sanctity of contracts).

[18] He argues that the matter deserves to be referred to oral evidence apparently on the existence or otherwise of the verbal agreement. It would seem he bases that argument on the fact that Ms Rodolo filed a confirmatory affidavit disputing that she entered into an agreement with the respondent.

E. Discussion

[19] The way I see it, the parties have raised various disputes and these disputes cannot be resolved in these application papers. They include. (i) whether the agreement was reached or not, (ii) whether the fees charged are fair and reasonable. I understand that the payment of a security is predicated on the acknowledgement and appreciation of the existence of the disputes.

[20] In appreciation of these disputes, the applicant issued these proceedings on the basis that a reasonable security was offered to the respondent so that her claim of lien is defeated. The result would have been that the disputed issues are ventilated in a trial court. If a letter that heralded these proceedings did not signal that enough to the respondent, the notice of motion makes it plain.

[21] To raise all those disputes which would have been ventilated during a trial previously proposed by the applicant is not an answer to this application. Said otherwise, the disputes raised are irrelevant for purpose of this application.

[22] I consequently hold a view that the disputed issues are directed towards recovering the outstanding amounts not so much on the security. As such, a security for the payment has been made. Whether it is reasonable or not is something that should be at the centre of this application.

[23] Long before the institution of this application a letter adverted to above dated 3 April 2023 was written to the applicant stating that an amount of R8 780.25 was paid to the respondent and that the balance (R9 332.25) was kept by the applicant's attorney in a trust account. Trust account of attorneys is designed to keep and invest clients' monies. The attorneys in this matter for the applicant confirmed that security is in their possession.

[24] The respondent's attorneys did not dispute the contents of the letter nor did they propose any other form of security which satisfies them. I find the approach of the respondent very unreasonable and attracted an unnecessary litigation.

[25] An option was available to the respondent to serve summons as previously proposed and raise all the defences that allegedly entitle it to the fees and charges contained in his invoice. During the envisaged trial some of the issues are likely to: (a) whether the charges of the respondent were agreed to or not and (b) whether the charges are reasonable or not.

[26] The right of lien raised by the respondent is understood to be a right to retain physical control of another's property, whether movable or immovable, as means of securing payment of a claim relating to the expenditure of money or sometimes of monetary value by the possession until the claim is satisfied (***Brooklyn House Furnishers (Pty) Ltd v Knoetze and Sons 1970 (3) SA 364 (AD) at 270E***).

[27] The said right of lien relied upon by the respondent in resisting to release the vehicle may be defeated by furnishing of adequate security for the payment of debt secured. (***Hochmetals Africa (Pty) Ltd v Otari Mining Co (Pty) Ltd 1968 (1) SA 571 AD at 582***).

[28] The payment to the attorney's trust account of the balance of the claim of the respondent and an undertaking to pay the balance on the success of the respondent's claim to me is a reasonable approach to which the respondent paid no deserving attention.

[29] No doubt, the envisaged claim of the respondent would have progressed significantly by now. The respondent elected to invest on this application than investing its resources towards the proposed recovery process.

[30] I do not get a sense that once the insured vehicle is released the applicant will delay the respondent's recovery of his expenses. The converse is true, looking at the contents of a letter written by the applicant as mentioned above.

[31] The applicant as the owner of the insured vehicle is entitled as it has done so, to furnish security for payment of the debt (in this case the balance and storage costs) and as against the furnishing of that security to release of the vehicle held (*Pheiffer v Van Wyk and others 2015 (5) SA 464 SCA*).

[32] I am not persuaded that the attorney and client costs are warranted. I could not discern a complex and complicated aspect of the matter that necessitates scale "C" and "B" under rule 67A of the Rules of Court. Scale "A" is fitting.

F. Conclusion

[33] In exercise of my discretion, I find that the substitute security tendered is adequate and that the applicant is entitled to delivery of the insured vehicle.

[34] In the result, I grant the following order:

(a) The respondent is ordered to release a HYUNDAI I20 motor vehicle with registration letters and numbers J[...], VIN number M[...] and Engine number G[...] ("the Motor vehicle") to the applicant's nominated representative within 5 (five) days of the service of this order upon it.

(b) In the event of the respondent failing, alternatively, refusing to comply with the order in paragraph (a) above, the sheriff is authorised to take possession of the vehicle wherever it may be found and to forthwith hand over possession of the vehicle to the applicant's nominated representative.

(c) The applicant having made payment to the respondent in the amount of R8 780.25, and the balance of the respondent's invoice, being an amount of R9 332.25 having been paid into the applicant's Attorneys trust account, shall pay the further storage charges (calculated at R350.00 per day from 03 April 2023 until the date upon which this order is granted) into the trust account of the applicant's attorneys within 5 (five) days of the service of this order to be retained as security pending the final resolution of any legal proceedings to be instituted by the respondent within 30 (thirty) calendar days of the service of this order to claim its legal fees for the towing, storage, recovery, administration and security in respect of the vehicle;

(d) Should the respondent fail to institute legal proceedings contemplated in paragraph (c) above within 30 (thirty) calendar days after the service of this order, an amount paid into the trust account of the applicant's attorneys shall be released to the applicant.

(e) The respondent is ordered to pay the costs of this application on the party and party scale "A".

V KUNJU

ACTING JUDGE OF THE HIGH COURT

Appearances:

For the applicant:

Adv Hobbs

Instructed by:

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For the respondent:

No Appearance.

Heard: 23 May 2024.
Delivered: 23 May 2024.