

**REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

CASE NUMBER: 2023-0662813

(1) REPORTABLE: No

(2) OF INTEREST TO OTHER JUDGES: No

(3) REVISED

DATE: 20/9/2024

SIGNATURE

In the matter between

OCTAVIA DATA EXCHANGE (PTY)LTD

APPLICANT

and

**LIFE WISE CC t/a ELDAN AUTO BODY
(Registration Number 1994/019501/23)**

RESPONDENT

JUDGMENT

RAMLAL AJ:

- [1] The Applicant applies for vindicatory relief against the Respondent, in that the Applicant seeks the delivery of a motor vehicle in respect of which the Applicant is the registered owner and title holder.
- [2] In order to succeed in a claim for vindicatory relief, the Applicant must allege and prove the ownership of the movable or immovable thing and that the

Respondent was in possession of the property when the application was instituted.

- [3] Although it was initially raised as a point *in limine*, it is not in dispute that the Applicant is the registered owner of the Mercedes Benz V 222 with registration number D[...]. It is also not in dispute that the Respondent was in possession of the said motor vehicle belonging to the Applicant at the time of the institution of the application and that the Respondent remains in possession of the said motor vehicle.
- [4] On 23 May 2019, Mr Andre G Bore (AG Bore), a director of the Applicant, was involved in a motor vehicle accident with the Applicant's vehicle. The Applicant's broker instructed AG Bore to have the vehicle taken to a Mercedes Benz approved panel beater for the vehicle to be assessed by the insurance company. Appropriate arrangements were made for the vehicle to be collected and transported to the premises of the Respondent. It is not in dispute that AG Bore did not deliver the vehicle to the Respondent's premises and that he was not present when the vehicle was delivered to the premises of the Respondent.
- [5] There was no communication, either in writing or verbally, between the Respondent and the Applicant regarding any quotation for the repair of the vehicle or any storage costs for the vehicle that was delivered to the Respondent's premises.
- [6] The Applicant relied on the broker to facilitate the arrangements for the repair to the Applicant's vehicle with the insurer of the other vehicle that was involved in the collision as it was believed that the other party was the cause of the accident.
- [7] In May 2021, the broker informed AG Bore that the Applicant should seek an alternative solution for the repair of the vehicle and that as the vehicle had been at the premises of the Respondent for a considerable length of time, the storage fees were accumulating.

- [8] Despite this mention by the broker to the Applicant regarding storage costs, no invoices or communication from the Respondent regarding storage costs or for the repair of the vehicle was received from the Respondent. In October 2022, the broker informed AG Bore to contact the Respondent to discuss the storage fees in respect of the vehicle that was at the Respondent's premises. A further two months had lapsed, and no communication was received from the Respondent regarding the payment of storage costs or arrangements regarding the repair of the vehicle.
- [9] In December 2022, AG Bore and the broker visited the premises of the Respondent. AG Bore was surprised to find the vehicle out in the open on an unsecured piece of land, without any protection from attracting further damages. Photographs were taken and these were attached to the application. The Respondent informed AG Bore that the outstanding storage fees amounted to between R600 000 to R700 000. AG Bore objected to this.
- [10] On 10 February 2023, the Applicant's attorney sent a letter to the Respondent demanding the return of the Applicant's motor vehicle. On 20 February 2023, the Applicant received a letter from the Respondent's attorney of record, stating that AG Bore had rejected the quotation for the repair of the vehicle and that he failed to collect the vehicle, despite being offered many opportunities to do so. The Respondent furnished a schedule detailing the accumulation of the storage fees for the duration that the vehicle was at the Respondent's premises. The Applicant's attorney requested the Respondent to provide the quote that was rejected and any correspondence where the Applicant was requested to remove his vehicle. No response was received to this communication.
- [11] The Applicant is adamant that the Respondent has neither communicated with the Applicant nor AG Bore in respect of the vehicle that was retained at its premises. Further that neither the Applicant nor AG Bore were informed that storage costs would be levied.

[12] The Respondent, in its answering affidavit challenged the ownership of the vehicle. On the date of the hearing, it conceded that it was no longer challenging the ownership of the vehicle.

[13] The Respondent attached a detailed estimate in respect of repair costs to its answering affidavit, which reflects the date of 5 September 2023 as the date on which the document was printed. In essence, the Respondent claims payment of the storage fees before the vehicle will be released to the Applicant.

[14] In *Chetty vs Naidoo*¹ it was held that

“in order to succeed, it is incumbent on the claimant to prove the following basic elements of the action *rei vindicatio*,

i. That he or she is the owner of the thing,

ii. That the thing was in possession of the defendant at the time the action was commenced; and

iii. That the thing which is vindicated is still in existence and clearly identifiable”

[15] The case of *Steenkamp vs Bradbury’s Commercial Autobody CC*² has relevance to the application before this court as the facts are similar:

[16].....There is no averment in the Respondent’s papers that the amount of R350.00 per day was agreed upon or that it constitutes the usual normal storage costs for the

vehicle. In my view, if there was indeed any agreement, express or tacit, that storage cost would be charged by the Respondent, it was

¹ 1974(3)SA13(A)208-C

² 2020 JDR0807 (LP)

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...”

[17] The reliance on tacit contract for storage costs is clearly an afterthought on the Respondent’s part. In the absence of agreement on 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-à-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 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 improvement) 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 and Lainsburg School Board v Logan (1910) 27 SC 240)”.

[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.

[16] In *Standard Bank of South Africa Ltd v Mohlabafase Panelbeating & Spraying Painting CC and Another*³ it was held as follows:

[18] 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*. Liens are generally divided into debtor and creditor liens on the one hand and enrichment liens on the other hand.

[19] Debtor and Creditor 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*⁴

[17] A further discussion on the types of liens that may be relied on is explained in the above judgment. At paragraph 24, the court expounds on the vindicatory action, as follows:

[24] The objective of a *rei vindicatio* is to restore physical control of the property to the owner, with ownership forming the basis for such claim. Three requirements must be met for the *rei*

³ (4692/2019) [2023] ZALMPPHC 17 (27 March 2023)

⁴ 1965 (2) SA 525 (A)

vindicatio to be successfully invoked⁵. In order to succeed with this real right remedy an applicant needs to allege and prove:

24.1 That he or she is the owner of the thing,

24.2 That the thing was in possession of the respondent when proceedings were instituted; and

24.3 That the thing which is vindicated is still in existence and clearly identifiable”

In this matter all of these three requirements are common cause.

[25] The First Respondent in its answering affidavit has not attempted to show this court, which lien it relies on, save to submit that the only way it will willingly release the motor vehicle will be on full payment of its storage costs. Based on the exposition on the law on liens herein above, the would be applicable one may be the Debtor and creditor lien. However, this would need for the First Respondent to prove the contract between it and the Applicant. The First Respondent has not made out any case in its papers or in argument on this, because same does not exist. It is trite that a party falls and stands by its papers. The only contract that may exist is between the First and the Second Respondents, the Applicant is not a party thereto. As a result, cannot be held to ransom on “contractual terms” it was not party to. In any event is the said alleged contract between the First and Respondents were proven herein it would still not bind and/or apply to the Applicant who is the owner herein.

⁵ G Muller et al The Law of Property: Silberberg and Schoeman's 6 ed (2019) at 269-270

[18] The evidence that has been placed before this court demonstrates that the Applicant is the title holder and registered owner of the motor vehicle, Mercedes Benz V 222, with registration number D[...]. At the time when this application was initiated, the Respondent was and still is in possession of the motor vehicle which is the subject matter of this application. The motor vehicle which the Applicant seeks to vindicate is clearly identifiable.

[19] Although the Respondent contends that the Applicant was informed of the liability for storage costs, the Respondent has failed to allege and prove that it entered into any agreement with the Applicant for the payment of such storage costs.

[20] Storage costs cannot be claimed merely because the property of the Applicant was kept at the premises of the Respondent.⁶

[21] In an attempt to pursue the recovery of storage costs from the Applicant, the Respondent sought to institute a counter-application against the Applicant. The procedure to be followed when a counter application is pursued is clearly stipulated in the Uniform Rules of Court.

[22] Rule 6(1) of the Uniform Rules of Court provides:

“Every application must be brought on notice of motion supported by an affidavit as to the facts upon which the applicant relies for relief” and

Rule 6(7) provides:

(a) Any party to any application proceedings may bring a counter-application or may join any party to the same extent as would be competent if the party wishing to bring such counter-application or join such party were a defendant in an action and the other parties to the

⁶ Steenkamp v Bradbury's Commercial Autobody CC 2020JDR0807 (LP)

application were parties to such action. In the latter event, the provisions of Rule 10 will apply.

(b) The periods prescribed with regard to applications apply to counter-applications: Provided that the court may on good cause shown postpone the hearing of the application.

[23] The purported counter-application of the Respondent is defective as it does not comply with the provisions of Rule 6 of the Uniform Rules of Court and this court cannot adjudicate on it.

[24] Upon a thorough evaluation of the evidence that has been placed before me, I see no reason why the motor vehicle should not be returned to the Applicant. Having had insight into the photographs that have been filed it is incumbent upon this court to protect the rights of the Applicant against any further damages that may ensue to the property of the Applicant.

[22] The Applicant has prayed for costs to be awarded on an attorney and client scale. The award of costs is an discretion that a court must exercise judiciously. The conduct of the Respondent leaves much to be desired. The Respondent placed the ownership of the motor vehicle in dispute and then conceded the ownership of the vehicle which resulted in the Respondent having no defence to the application made by the Applicant and concluded by lodging a counter-application that does not comply with the Uniform Rules of Court. The stance taken by the Respondent to subject the Applicant to this litigation, informs my view that the costs order as prayed for is warranted.

[23] In the result I make an order in the following terms:

1. The Respondent is hereby ordered to deliver to the Applicant at the Respondent's place of business the Mercedes Benz V 222 with registration number D[...] ("the Applicant's motor vehicle")

2. The sheriff or his lawful deputy is hereby authorised and directed to attach and remove the Applicant's motor vehicle from the Respondent's premises in the event that upon service of the order, the Respondent fails to effect delivery of the Applicant's motor vehicle
3. The Respondent is ordered to pay the costs of this application on scale B in terms of Rule 67 (A)(3)

A.K. RAMLAL AJ

This judgment was handed down electronically by circulation to the parties' and/or parties' representatives by email. The date and time for hand-down is deemed to be 11h00 on 20 September 2024.

Matter heard on: 28 May 2024
Judgment granted on: 20 September 2024

Appearances:

On behalf of the Applicant	Adv. Johan H Scheepers johanscheepers@clubadvocates.co.za
Instructed by:	Bennecke Thom Incorporated aloise@btinlaw.co.za
On behalf of the Respondent	Sham Shalom Cohen
Instructed by:	Thomson Wilks Incorporated john@thomsonwilks.co.za

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RESPONDENT

ORDER

Having considered the papers filed and having heard counsel for the parties, the Court grants an order in the following terms:

1. The Respondent is hereby ordered to deliver to the Applicant at the Respondent's place of business the Mercedes Benz V 222 with registration number D[...] ("the Applicant's motor vehicle")
2. The sheriff or his lawful deputy is hereby authorised and directed to attach and remove the Applicant's motor vehicle from the Respondent's premises in the event that upon service of the order, the Respondent fails to effect delivery of the Applicant's motor vehicle
3. The Respondent is ordered to pay the costs of this application on scale B in terms of Rule 67 (A)(3)

On behalf of the Applicant

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