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

CASE NO:019678/2022

(1) REPORTABLE: NO

(2) OF INTEREST TO OTHER JUDGES: NO

(3) REVISED: YES

JC UYS SC

10 OCTOBER 2024

In the matter between:

SALVAGE GENIE (PTY) LTD

Applicant

and

ABSA BANK LIMITED

First Respondent

NEDBANK LIMITED

Second Respondent

STANDARD BANK LIMITED

Third Respondent

JIMMY ELIAS MASANGO

Fourth Respondent

JUDGMENT

UYS AJ

[1] This is a counter-application by First Respondent founded upon *rei vindicatio* for the return to First Respondent of:

[1.1] three motor vehicles, to wit:

[1.1.1] a 2012 Kia Sportage manual motor vehicle bearing VIN number K[...] and engine number G[...];

[1.1.2] a 2020 Renault Kwid motor vehicle bearing VIN number M[...]; and

[1.1.3] a 2016 Jeep Grand Cherokee motor vehicle bearing VIN number I[...] and engine number F[...]¹,

[1.2] all access mechanisms of the vehicles such as keys, etc.; and

[1.3] in the event of the vehicles not so being returned, to allow for the sheriff of this court and/or the South African Police Services to give effect to the order for such return as well as ancillary relief.

[2] First Respondent also seeks, in respect of its counter-application, an order for costs of such counter-application (to be paid by Applicant) on a scale as between attorney and client, alternatively *de bonis propriis*.

[3] The litigation history between the parties in respect of the vehicles forming the subject matter of First Respondent's counter-application can briefly be summarised as follows:

[3.1] Applicant caused an *ex parte* application to be launched wherein it *inter alia* sought for a lien (which Applicant alleged to possess over a host of motor vehicles contained within a schedule) to be "*perfected*" and for Applicant to

¹ referred to herein as "*the vehicles*" or where appropriate individually as the "*Kia Sportage*", "*Renault Kwid*" or "*Jeep Grand Cherokee*" depending upon context

be declared to be entitled to *“its claim sounding in money”* in terms of each vehicle as well as a multitude of ancillary relief.

[3.2] On 27 October 2022, Keightley J issued a *rule nisi* in Applicant’s *ex parte* application in the following terms (quoted verbatim):

- “1. That the lien which the Applicant holds over the motor vehicles mentioned in ‘Annexure A1’ (vehicles listed in the table as A489 – A507), be perfected and the Applicant be entitled to its claim sounding in money in terms of each vehicle therein contained.*
- 2. That the Applicant is entitled to dispose of the vehicle(s) to defray its costs.*
- 3. That this order sought be valid against the registered owner and/or titleholder(s) and/or any other third parties who allege a claim against a vehicle listed in Annexure ‘A1’.*
- 4. That this order sought be valid and binding in respect of the vehicle licensing authorities in any province of the Republic of South Africa.*
- 5. That the above rule operate as an interim order and that the Respondent(s) be ordered to show cause (if any) to the above Honourable Court on 1st day of December 2022 at 10h00 why this order should not be confirmed and punitive costs thereof be granted against the Respondent(s) on attorney and client scale.*
- 6. The return date may be anticipated by the Respondent(s) upon 24 (Twenty Four) hours’ notice to the Applicant or Applicant’s attorney.*
- 7. Costs in the main application.”²*

² CaseLines pages 0-1 to 0-2. It is common cause that the 27 October 2022 order was granted without service of the application having been effected on any other entities or titleholders of the vehicles, despite

- [3.3] First Respondent subsequently opposed the *ex parte* application on 28 November 2022;
- [3.4] On 1 December 2022, Dosio J joined *inter alia* First Respondent to Applicant's (former *ex parte*) application and ordered Applicant to pay the costs occasioned by the postponement and further granted an order that First Respondent could supplement its answering affidavit then already filed, to the extent necessary.³
- [3.5] The rule initially issued by Keightley J on 27 October 2022 was extended on a number of occasions, with First Respondent on or about 15 May 2023 having filed the counter-application in these proceedings founded upon a *rei vindicatio* in respect of the vehicles.⁴
- [3.6] On 7 June 2023, Bishop AJ discharged the *rule nisi* granted on 27 October 2022 and ordered Applicant to pay the costs⁵.
- [3.6.1] No formal judgment was handed down by Bishop AJ when the order aforesaid was made by him, but the transcript of the proceedings before Bishop AJ was part of the papers before me when First Respondent's counter-application was argued.
- [3.6.2] Besides having criticised Applicant for the application having been brought *ex parte* under circumstances where Applicant had full knowledge of the identity of the owners and specifically also of that of First Respondent, Bishop AJ also indicated that from the papers before him, he could not tell whether there was even a *prima facie* (enforceable) right or lien.

Applicant having had knowledge of their identity. See transcript of proceedings before Bishop AJ on 7 June 2023 – CaseLines page 0-13

³ See paragraph 2 of the order by Dosio J of 1 December 2022, CaseLines page 07-5. This First Respondent subsequently did together with a counter-application thereto

⁴ as detailed in paragraph [1] above

⁵ CaseLines page 0-9

[3.6.3] Bishop AJ also during that hearing put to Ms Crisp, who on that occasion appeared for the Applicant and who also appeared for the Applicant when this matter came before me, that : *“I can understand for the original companies who had the cars, who had repaired them and then nobody came to collect them but Storage Genie decided to step into their shoes in order to make money out of this process. So the fact that they have kept the cars or had to keep the cars is of their own doing.”*⁶

[3.7] As aforesaid, Bishop AJ then discharged the rule, as a result whereof the earlier order by Keightley J fell away.

[4] The counter-application brought by First Respondent is opposed by Applicant essentially on the basis of alleged agreements for *“... the cession of rights pertaining to monies owed in respect of an abandoned vehicle ...”* entered into between Applicant and various third parties who previously appear to or might have had possession of the vehicles.⁷

[5] In the answering affidavit filed by Applicant (in the counter-application of First Respondent) it was common cause that the vehicles were in the possession and under control of Applicant,⁸ such affidavit deposed to on 15 June 2023.

[6] It was further admitted by Applicant that First Respondent was the title holder, thus by necessary inference also the owner of the vehicles.⁹

[7] The essence of the defence raised by Applicant to First Respondent's counter-application, mindful of the fact that First Respondent's ownership of and Applicant's

⁶ CaseLines pages 0-13, 0-14, 0-25 and 0-30. Bishop AJ was, however, at pains to make it clear that his finding would not result in the matter being *res judicata* (seemingly relating to his comments on his *prima facie* view concerning the lien relied upon)

⁷ See Annexures “ER2a” to “ER2d” to Applicant's answering affidavit, CaseLines pages 032-14 to 032-20

⁸ Applicant's answering affidavit, paragraph 13, CaseLines page 032-5 to 032-6

⁹ Applicant's answering affidavit, paragraph 15, CaseLines page 032-6

possession of the vehicles was common cause, was formulated in the following manner by Applicant:

*"[Applicant] deny that it [First Respondent] can vindicate them [Applicant] without paying for the release of the vehicles as Salvage Genie [Applicant] has a right of retention over the vehicles which are in its possession."*¹⁰

[8] It is trite that in a claim founded on *rei vindicatio*, all that needs to be shown by the entity claiming delivery, is ownership of the object (in this instance the vehicles) and the fact that the party from whom it is claimed is in possession thereof, the latter at the very at least at the time of launching the proceedings. As aforesaid, the above are common cause facts herein.

[9] Resulting from the said common cause facts, the onus in this instance is on Applicant to show its entitlement to retain possession, with the highwater mark on the papers filed by Applicant as to its entitlement to retain possession, stipulated as being:

[9.1] that Applicant *"... has a right of retention as it is the holder of a cession agreement to the vehicle, a copy of which is annexed hereto as "ER2a" to "ER2d" "*¹¹;

[9.2] First Respondent *"... would be unjustly enriched should the vehicle be returned to it without honouring any obligations to Salvage Genie in terms of the Lien held by Salvage Genie."*¹²; and

[9.3] *"Salvage Genie cannot be placed out of pocket for the benefit of ABSA. The negotiorum gestio principle being applied herein will result in the fact that Salvage Genie preserved ABSA's asset that Salvage Genie must be compensated for such preservation of ABSA's asset so preserved."*

¹⁰ Applicant's answering affidavit, paragraph 15, CaseLines page 032-6

¹¹ Applicant's answering affidavit, paragraph 18, CaseLines page 032-7

¹² Applicant's answering affidavit, CaseLines page 032-7

[10] The essential flaw in Applicant's argument is accentuated by the statement contained in its answering affidavit that apparently "... *the lien held by the workshops ...*" had "... *been ceded to Salvage Genie.*".

[11] As correctly stated in Applicant's own heads of argument: "*A lien is merely security for a debt and does not afford the lien holder a right to execute in respect of the property subject to the lien.*"¹³ (own emphasis)

[12] In *Brooklyn House Furnishers Limited v Knoetze and Sons*¹⁴ the Appellate Division held that:

"n Retensiereg, jus retentionis, is die reg wat die besitter van 'n saak van iemand anders, waaraan hy geld of arbeid bestee het, verkry om die saak in sy besit te hou totdat hy volgens ooreenkoms of, waar daar geen ooreenkoms was nie, vir sy werklike uitgawes of arbeid, maar hoogstens tot die mate van die eienaar se verryking, behoorlik vergoed is. Dit is bloot 'n verweer teen die eienaar se rei vindicatio, en maak opsigself geen eisorsaak uit nie."¹⁵

[13] A right of retention pertaining to preservation of an asset does not arise from agreement, but is founded on the principle of "*jure naturae aequum est neminem cum alterius detrimento et injuria fieri locupletiolem*" as was stated in *Brooklyn House Furnishers Limited*¹⁶ thus that where no enrichment of the owner of a thing occurs, no right of retention exists.

[14] The improvement lien held by the entities that allegedly performed work on the motor vehicles (assumed for purposes of this judgment to have occurred without finding that it actually had so occurred), was lost when they voluntarily released the vehicles to Applicant.¹⁷

¹³ Applicant's heads of argument, paragraph 3.2, CaseLines pages 38-9 to 39-10

¹⁴ 1970 (3) SA 265 (AD)

¹⁵ at page 27 E-F

¹⁶ *supra* at 271 C-D

¹⁷ See LAWSA (2nd Edition), Volume 15, part 2 at paragraph 53

- [15] Applicant, through the cession agreement entered into, did not acquire a lien through cession, this not only mindful of the fact that a lien is merely security for a debt and not an individual debt or cause of action, but also as the lien *per se* had not and could not be ceded in present circumstances.¹⁸
- [16] Applicant further on its papers made out no proper case upon which to found a case for unjustified enrichment to enable it to rely on *jus retentionis* in respect of the vehicles.
- [17] The above findings do not have the effect of barring Applicant from launching an action to claim payment of any possible unjustified enrichment or other damages it may allege to have suffered. The essence of this judgment relates and deals with the question of any current entitlement by Applicant to retain possession of the vehicles and whether a proper case for such entitlement has been made out in the papers before me.
- [18] Ms Crisp on behalf of Applicant endeavoured later during argument to rely solely on a separate lien of the Applicant itself, to wit an alleged salvage or preservation lien.
- [19] Mr Alli on behalf of the First Respondent referred me in this regard to the unreported judgment of *Gatter v Grand Tech Auto (Pty) Limited and Another*¹⁹ a judgment in this division where a claim was similarly raised relevant to storage costs in respect of a motor vehicle, there also characterised as a lien, with Gilbert AJ in the *Gatter* judgment having found that no right of retention can exist in a vacuum and that same needs to be supported by an underlying claim such as unjustified enrichment

¹⁸ In *Deutschmann v Mpeti* 1917 CPD 79 at 82 the court held “If, however (independently of the case of pledges to pawnbrokers), any private person has mortgaged as his own a thing lent or hired to him or deposited with him Van Leeuwen (Cens. For., 1.4.7.15 to 17) mentions that it has been adjudged that ordinarily the mortgage does not stand.” I do not see why a pledge of movables should be in any better position than the persons referred to by Van Leeuwen, and Voet seems clearly to imply by his general proposition that he is not. Nor can I find any authority to the effect that a pledge of a movable may re-pledge the article delivered to him in security, by merely ceding the debt and delivering the article, so as to prevent the original pledger from demanding the article delivered from him.”

¹⁹ 2022 JDR 2247 (GJ)

in respect of an enrichment lien, or if in contract, in respect of a debtor or creditor lien.

[20] Gilbert AJ in *Gatter v Grand Tech Auto (Pty) Limited*²⁰ *inter alia* held in his judgment:

*“As described earlier in this judgment, the respondents have, on the evidence before me, failed to establish an agreement that the applicant would pay for storage, and therefore such storage costs cannot not fall within the ambit of a debtor / creditor lien. Further, as appears above, the respondents too have not set out a sustainable basis on the evidence before me that either of them have a claim in unjustified enrichment to sustain an enrichment lien in respect of the storage costs.”*²¹

[21] I find myself in agreement with and in a similar position to that formulated in the aforesaid quoted portion of the judgment by Gilbert AJ, in that there is simply no evidence on Applicant’s papers before me that can found any agreement by First Respondent that it would have paid or would pay for storage costs or furthermore that could found an enrichment lien pertaining to storage, salvage or preservation costs.

[22] In light of the above, all of the defences raised by Applicant against the counter-application of First Respondent are found to be without merit.

[23] A last remaining issue is that of costs. Mention was hereinabove made that at the time of the launching of the counter-application and specifically the filing of Applicant’s answering affidavit thereto, Applicant’s possession and/or control of the vehicles were common cause.

²⁰ *supra*

²¹ at paragraph 57

[24] Shortly prior to this matter having been argued before me, Ms Crisp filed supplementary heads of argument²² wherein the purpose thereof was described as being to “*bring to the fore*” that Respondent (clearly there intended as a reference to Applicant) was not in possession of two of the vehicles, to wit the Renault Kwid and the Jeep Grand Cherokee, with it then stated that the application was thus moot in respect of possession of those vehicles. The allegation of mootness is unfounded given the manner in which the relief sought in the counterclaim has been formulated.

[25] I find it concerning and wholly unsatisfactory that Applicant’s attorneys deemed it appropriate to simply by means of supplementary heads of argument and in absence of any evidence presented on affidavit in that regard, thus essentially simply from the bar, sought to inform the court that those two vehicles were not in its possession. This where previously it was under oath confirmed by Applicant that same were so within its possession or control and without any evidence of such fact or explanation proffered on oath as to why those two vehicles were (allegedly) no longer in its possession, since when same were no longer in its possession, under what circumstances it relinquished its possession, etc. Applicant thus clearly chose not to have taken the court into its confidence by disclosing under oath the actual possible changed facts.

[26] Irrespective of my above criticism of Applicant’s attorneys’ aforesaid conduct, the opposition (and continued opposition by Applicant even after the rule was discharged) to First Respondent’s counter-application by Applicant herein, falls within the ambit of being vexatious in the sense detailed in *In re Alluvial Creek Limited*²³ where it was held pertaining to an order there sought of costs as between attorney and client that:

“Sometimes such an order is given because of something in the conduct of a party which the court considers should be punished, malice, misleading the court and things like that, but I think the order may also be granted without

²² so filed on 29 July 2024

²³ 1929 CPD at 532

any reflection upon the party where the proceedings are vexatious, and by vexatious I mean where they have the effect of being vexatious, although the intent may not have been that they should be vexatious. There are people who enter into litigation with the most upright purpose and most firm belief in the justice of their cause, and yet whose proceedings may be regarded as vexatious when they put the other side to unnecessary trouble and expense which the other side ought not to bear, that I think is the position in the present case."²⁴ (own emphasis)

[27] As in *In re Alluvial Creek*, I hold the view that Applicant has put First Respondent to unnecessary expense in these proceedings and which expense First Respondent ought not to bear.

[28] Accordingly, I make the following order:

1. SALVAGE GENIE (PTY) LIMITED and/or any other party, entity or person that may be in possession of the motor vehicles more fully described hereunder ("*the motor vehicles*"), are ordered to return them, inclusive of all access mechanisms such as keys, etc., pertaining to each vehicle, to ABSA BANK LIMITED forthwith:
 - 1.1 a 2012 Kia Sportage manual motor vehicle bearing VIN number K[...] and engine number G[...];
 - 1.2 a 2020 Renault Kwid motor vehicle bearing VIN number M[...]; and
 - 1.3 a 2016 Jeep Grand Cherokee motor vehicle bearing VIN number I[...] and engine number F[...].
2. In the event that SALVAGE GENIE (PTY) LIMITED or any other person in possession of the aforesaid motor vehicles refuses or fails to return them or to comply with the order in paragraph 1 above, ABSA BANK LIMITED and/or any of its authorised representatives are entitled to approach the sheriff of the

²⁴ at page 535

above Honourable Court and/or its lawful deputy and/or the South African Police Services to assist in giving effect to the order in paragraph 1 above and to ensure the return of all of the aforesaid motor vehicles as described in paragraph 1 above to ABSA BANK LIMITED and the sheriff of the above Honourable Court and/or its lawful deputy and/or the South African Police Services may utilise service providers to the extent necessary, inclusive of towing services to enable ABSA BANK LIMITED to be placed in possession and/or control of the vehicles.

3. SALVAGE GENIE (PTY) LIMITED is ordered to pay the costs of ABSA BANK LIMITED'S counter-application on the scale as between attorney and client inclusive of costs of counsel on scale C as contemplated by Uniform Rule 67A.

J C UYS SC

Acting Judge of the High Court
Gauteng Division, Johannesburg

Heard: 13 August 2024
Judgment: 10 October 2024

Appearances

For First Respondent
(in its counter-application): Adv N Alli
Instructed by: J Mothobi Inc

For Applicant: Ms R Crisp
(in First Respondent's counter-application) of R Crisp Attorneys