



**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, PIETERMARITZBURG**

CASE NO.: 17483/2023P

In the matter between:

WACOM (PTY) LTD

APPLICANT

(Company Registration Number: 2016/337022/07)

and

ANCHOR HOLDINGS 1983 (PTY) LTD

FIRST RESPONDENT

(Company Registration Number: 2018/586261/07)

ZATOVERT (PTY) LTD t/a OUTSOURCED

PROJECT SOLUTIONS

SECOND RESPONDENT

(Company Registration Number: 2013/160086/07)

REASONS

Chithi AJ:

Introduction

[1] I heard this matter on 28 November 2023 in which I dismissed the applicant's application with costs and directed that should any of the parties require reasons for my order those reasons should be requested in writing within five (5) days of the order.

[2] On 6 December 2023 the applicant delivered a request for reasons in terms of Uniform rule 49(1)(c). This request was only brought to my attention on 19 January 2024. The court file together with the request for reasons for my order was delivered to me on 24 January 2024. These are the reasons for my order.

[3] In this case the applicant brought an urgent *rei vindicatio* application in which the applicant sought an order directing the first respondent to return the applicant's property comprising goods listed in annexure 'GW1' ('the property') within 48 hours of the order being granted.

[4] The first respondent opposed the application on the following four grounds:

- (a) The application was not urgent.
- (b) The applicant failed to comply with the practice directive 10 of Practice Manual of the KwaZulu-Natal Division of the High Court in respect of urgency.
- (c) The applicant failed to establish the requisites of the *rei vindicatio*.
- (d) The first respondent had an enrichment lien over the property in the form of a salvage lien.

[5] The second respondent was merely cited as an interested party in the proceedings against whom no relief was sought, and it did not oppose the application.

Factual background

[6] The background of this case is that the applicant sells commodities, animal feed ingredients, and chemicals. On or about 17 June 2022 and at Bryanston the applicant entered into a written agreement with the second respondent for *inter alia* the handling and packaging of goods imported by the applicant. In addition to this agreement the applicant and the second respondent entered into a further verbal agreement for the use of warehouse space for storage purposes at its warehouse in Durban. The second respondent would render monthly invoices for the total tonnage handled and stored by it and the applicant would effect payment thereof. At the time when the applicant concluded the agreement with the second respondent it was unaware that the second respondent had entered into a service agreement with the first respondent for the use of the warehouse.

[7] The applicant provided the second respondent with packaging equipment, which comprised of a bagging unit, a conveyor, an industrial stitcher, a 200-liter compressor for the bagging plant, 25kg packaging bags, sling packaging bags, bulk packaging bags and stitching cotton. During 2022 and 2023 the applicant imported various shipments of goods, which are currently being held at the first respondent's premises. The value of these goods is at R2 622 052.32. The packaging equipment and stock are valued at R3 373 052.31. During September 2023, the applicant was appraised of a payment dispute between the first and second respondents, arising from the fact that the second respondent fell into arrears in respect of the service agreement. When the applicant came to know of the payment dispute a meeting was arranged between the representatives of the applicant and the first respondent for 8 September 2023, wherein the applicant advised the first respondent that there was no reason why the second respondent owed the first respondent money as the second respondent was paid promptly, as the cargo arrived into the warehouse.

[8] On 11 September 2023, the applicant addressed an email to the second respondent with a release form directing that cargo (ie part of the property) be released on 12 September 2023. The release request was forwarded by the second respondent to Mr Gansen Naidoo of the first respondent who on the same day replied that they had received a directive not to release any cargo until further notice. Afterwards there were telephonic engagements and written correspondence between the representatives of the applicant and the first respondent in relation to the unpaid invoices by the second respondent to the first respondent and the release of the cargo. These engagements ultimately resulted in the first respondent releasing the cargo (ie part of the property) to the applicant.

[9] On 18 September 2023, the applicant and the first respondent negotiated an agreement to move over the warehousing and storage solution directly to the first respondent, but unfortunately, those negotiations failed.

[10] The events that directly triggered the launch of this application are as set out below. On 8 November 2023 the applicant's representative, Intertek Agri Services ('Intertek'), attended at the first respondent's premises to uplift the packaging equipment, but the first respondent denied the Intertek truck entry to the premises and

sent it away. When this incident came to the attention of the applicant, there was a telephonic engagement between the representatives of the applicant and the first respondent regarding the first respondent's entitlement to retain the applicant's property as a result of a payment dispute, which the applicant insisted that it was between the first respondent and the second respondent. The representative of the first respondent on the other hand asserted that they had a right to retain the applicant's property. When these telephonic negotiations failed the applicant addressed an email to the first respondent in which the applicant asserted that the first respondent had no right to hold onto the applicant's property for a payment dispute which the first respondent had with the second respondent. The applicant also enquired whether the first respondent would put a stop to cargo being uplifted on 13 November 2023, as trucks were booked to uplift the cargo. The first respondent did not respond to this email. On 17 November 2023, the applicant's attorneys wrote a letter of demand to the first respondent in which they demanded from the first respondent to release the applicant's property on 20 November 2023 on or before 09h00. On 19 November 2023, the applicant transmitted a release order to the first respondent for the release of the property identified in the release order for collection on 20 November 2023. On 20 November 2023, an Intertek truck attended at the first respondent's premises to uplift goods, but it was denied entry and was sent away.

The issues

[11] The following are the issues which were raised by the parties:

- (a) Whether the application was urgent.
- (b) Whether the applicant had established the prerequisites for a *rei vindicatio*.
- (c) Whether the first respondent had an enrichment lien over the property in the form of a salvage lien.

Case for the applicant

[12] It was contended on behalf of the applicant that the matter was urgent because the trigger of the application was the first respondent's refusal to release the property on 20 November 2023. It was further contended that there was no actual dispute regarding the applicant's ownership of the property. Moreover, there is no salvage lien over the property by the first respondent. It was argued that what the first respondent essentially asserts in relation to the property is a debtor and creditor lien. In addition,

it was contended that while it is denied that the first respondent has any right of retention, any such right, which the first respondent may have had was waived on 11 September 2023, when the first respondent agreed to release the applicant's property.

Case for the first respondent

[13] It was contended on behalf of the first respondent that although there is authority for the proposition that applications for vindicatory relief can be and are perhaps by their very nature urgent the applicant's application lost its urgency. The reason being the peculiar circumstances under which the possession of the property was vested in the first respondent, which constitute the subject matter of the application. Moreover, it was contended that the applicant has failed to allege and prove that it was the owner of the property that it wished to vindicate. The first respondent, as the owner of the warehouse and a logistic provider, whose principal business is to store goods at its premises on behalf of its customers, charges for those services. The very nature of those services are such that it preserves the goods for the benefit of the customer, protects the goods against theft and takes all reasonable steps to ensure the goods do not deteriorate. A warehouse's operation, therefore, by its very nature, requires the spending of money for the preservation or even the enhancement of the value of another's property. As such, the property would have either depreciated in value or perished without those necessary expenses. The first respondent had, over a period, safeguarded goods which were brought to its warehouse over many months and expended substantial sums of money by providing security services to prevent the theft of those goods, storage and measures to prevent contamination and damage from the elements. Although the first respondent did not have a contract with the applicant at the very least it has a claim for unjust enrichment against the applicant to the extent that the applicant has been enriched at the first respondent's expense in respect of the services which the first respondent has provided. The extent to which the applicant has been enriched at the first respondent's expense was in the sum of R660 452.45. The applicant was aware for three months that the second respondent was in breach of its agreement with the first respondent and according to the applicant's version it was aware of the payment dispute between the first and second respondents at least from 7 September 2023. Despite that the applicant continued to require that the first respondent (albeit via the second respondent) provide the services including on 28 September 2023.

[14] Relying on the case of *Pheiffer v Van Wyk*,¹ Mr Collingwood, for the first respondent, urged me to exercise my discretion to dismiss the application in the absence of the applicant furnishing adequate security. Mr Collingwood concluded by arguing that the onus was on the applicant to prove to prove waiver. The applicant had to show that the first respondent with the full knowledge of its rights decided to abandon its rights whether expressly or by conduct. Mr Collingwood relied on the case of *Laws v Rutherford*.² The first respondent contended that when it released a part of the property on 11 September 2023 it did so in good faith and did not release all of the property. The release of only a part of the property did not constitute a waiver.

Was the application urgent?

[15] Urgency is not determined by the nature of the claim brought but by the circumstances in which the applicant seeks its adjudication. In terms of Uniform rule 6(12) in order for an applicant to establish urgency it must satisfy two requirements. First, the applicant must set out in his affidavit the circumstances which render the case urgent. Second, the applicant must say why it would not be able to obtain 'substantial redress at a hearing in due course.' From the provisions of Uniform rule 6(12) there is 'no class of proceedings that enjoy inherent preference', or 'inherent urgency'.³ However, there are of course some types of cases which by their very nature must be determined speedily and those cases include among others spoliation applications,⁴ cases involving minor children,⁵ insolvency proceedings⁶ and contempt of court proceedings.⁷ In those cases too in order for the applicant to succeed it must satisfy the two requirements in terms of Uniform rule 6(1). A claim for vindication has been classified as one of the types of cases which by its very nature has to be determined speedily.⁸

¹ *Pheiffer v Van Wyk and others* [2014] ZASCA 87; 2015 (5) SA 464 (SCA).

² *Laws v Rutherford* 1924 AD 261 at 263.

³ *Volvo Financial Services Southern Africa (Pty) Ltd v Adamas Tkolose Trading CC* [2023] ZAGPJHC 846 para 6.

⁴ *Tswelopele Non-Profit Organisation and others v City of Tshwane Metropolitan Municipality and others* 2007 (6) SA 511 (SCA) para 21.

⁵ *B v B* 2008 (4) SA 535 (W) para 23.

⁶ *ABSA Bank v De Klerk and Related Cases* 1999 (4) SA 835 (E) at 839A; *Ex parte Nell N.O. and Others* (45279/14) [2014] ZAGPPHC 620; 2014 (6) SA 545 (GP) para 54.

⁷ *Protea Holdings (Pty) Ltd v Wright and another* 1978 (3) SA 865 (W) at 868H - 869A; *Wright v St Mary's Hospital, Melmoth, and another* 1993 (2) SA 226 (D) at 228E-F.

⁸ *VSA Motor Distributors (Pty) Ltd v Rossman and another* 1980 (3) SA 1164 (D); *Chetty v Naidoo* 1974 (3) SA 13 (A) at 20D.

[16] It is common cause that on 8 November 2023 the applicant sent its representative Intertek to attend at the first respondent's premises to uplift the cargo, but the first respondent denied entry to Intertek's truck and sent it away. It is further common cause that on 19 November 2023 the applicant's attorneys wrote a letter of demand to the first respondent in which it demanded the first respondent to release the property for collection on 20 November 2023. On 19 November 2023, the applicant transmitted a release order to the first respondent to release the goods identified on the annexures attached to the release order for collection on 20 November 2023. On 20 November 2023 when the Intertek truck attended at the first respondent's premises to collect the property it was denied entry and sent away.

[17] It has been held that where an applicant first seeks compliance from the respondent before lodging an application it cannot be said that the applicant had been dilatory in bringing the application or that the urgency thereof was self-created.⁹ While Mr *Collingwood* argued that whatever urgency the matter might have had had been lost he did not argue that I should strike the matter off the roll. I was and am still of the view that the matter was urgent and therefore proceeded to hear the matter on its merits. I say so because the events which triggered this application was first respondent's refusal to release the applicant's property on 8 November 2023. When this happened a telephonic engagement between the representatives of the applicant and the first respondent ensued regarding the first respondent's entitlement to retain the property. After these telephonic negotiations had failed the applicant addressed an email to the first respondent to say the first respondent had no right to hold onto the applicant's property for a payment dispute which had nothing to do with the applicant. In this email the applicant requested the first respondent to confirm if it would put a stop to cargo being uplifted on 13 November 2023, as trucks had been booked to uplift the cargo. When the first respondent did not respond to this email the applicant instructed its attorneys to write a letter of demand to the first respondent to demand the release of the property on 20 November 2023. When the first respondent refused to release the property on 22 November 2023 the applicant launched these proceedings. This application was instituted 13 days after the first respondent's

⁹ *Nelson Mandela Metropolitan Municipality and others v Greyvenouw CC and others* 2004 (2) SA 81 (SE) para 34.

refusal to release the property. It would have been unreasonable of the applicant to approach this court without first exacting compliance from the first respondent which it did by way of its email and the letter demand. The applicant therefore has not been dilatory and cannot be legitimately criticized for attempting to settle this matter through dialogue like it did on 11 September 2023 before resorting to litigation.

Was the applicant the owner of the property?

[18] For the applicant to succeed he needs to prove that it was the owner of the property in question and that the property in question is still *in esse* as an independent thing, and that the respondent is in control thereof.¹⁰

[19] The first respondent does not seriously dispute that the applicant is the owner of the property. I say so because the first respondent never disputed the applicant's ownership of the property in any of the telephonic and written exchanges that the representatives of the first respondent had with the representatives of the applicant spanning from 7 September 2023 to 19 November 2023. Consequently, there is no basis upon which the applicant's ownership of the property was put into question. I find that the applicant was the owner of the property and therefore entitled to approach this court by means of *rei vindicatio*.

Did the first respondent have an enrichment lien over the property?

[20] TJ Scott in *Lawsa* provides the following useful discussion on liens:¹¹

'A lien is conferred by operation of law. It must thus be classified as a form of tacit security, resorting under hypothec or mortgage in its comprehensive sense, in contrast with express mortgages where the security is created by agreement. Liens are also clearly distinguished from tacit hypothecs and set-off; they are aptly described as affording merely a defence against an owner's vindicatory action, and not a cause of action.

Where a person has incurred expenditure on property in pursuance of a contractual obligation existing between him- or herself and the person enjoying a possessory right over the property, this right of retention against the latter is termed a debtor and creditor lien. In the absence of such an agreement, a person who has spent money or done work on another person's property generally has a right of retention over that property, operating against the entire world.

¹⁰ *Goudini Chrome (Pty) Ltd v MCC Contracts (Pty) Ltd* 1993 (1) SA 77 (A) at 82; *Smit v Kleinhans* [2021] ZASCA 147 paras 8-9; *Chetty v Naidoo* 1974 (3) SA 12 (A).

¹¹ 26(1) *Lawsa* 3ed para 293.

This right may be either a real lien, a salvage and improvement lien, or an enrichment lien. A lien enables the retentor to retain possession of the property in question, until the expenditure on that property has been compensated.' ((footnotes removed)

[21] TJ Scott continues:¹²

'A real lien is afforded a person who has expended money, or labour with monetary value, on another's property, without any applicable prior contractual relationship between the parties. The expenditure in question has to be incurred while the person asserting the lien is in possession of the subject matter. Such liens are classified according to the type of expenditure incurred by the lien holder in respect of another's property.

It is well established that the expenditure which may be incurred in this regard may be classified under the following three heads: *impensae necessariae* (necessary expenses), that is expenses necessary for the preservation or protection of another's property or, stated negatively, expenses without which the property would either depreciate or perish; *impensae utiles* (useful expenses), that is expenses which enhance the market value of the property, although they are not necessary to preserve or protect it; and *impensae voluptuariae* (luxurious expenses), that is expenditure that does not preserve the property concerned, or increase its market value, but merely gratifies the caprice or fancy of a particular person.

A lien for the recovery of *impensae necessariae* is traditionally called a salvage lien or a lien for repairs, while one for the recovery of *impensae utiles* is termed an improvement lien.' (footnotes omitted)

[22] Furthermore, TJ Scott states:

'Where a person who falls within one of the classes of persons endowed by law with the power to exercise a real right of retention over property incurs expenses for the protection or preservation of property, his or her right is, strictly speaking, a salvage lien.' (footnotes omitted) Examples include safe keeping of property and warehousing and other expenses for the upkeep of goods which they have transported and stored.¹³

[23] It is common cause between the parties that the first respondent's principal business is that of warehousing and logistic provider. The applicant disputes the services that the first respondent renders, which according to the first respondent

¹² 26(1) *Lawsa* 3ed para 297.

¹³ 26(1) *Lawsa* 3ed para 306.

includes the storing of goods, their preservation against deterioration and protection against theft for the benefit of its customers. It is the applicant's version that it entered into a secondary verbal agreement with the second respondent for the use of the warehouse space as storage in relation to which the second respondent rendered monthly invoices for the total tonnage handled and stored by the second respondent for which the applicant would effect payment. From the applicant's own version, it seems indisputable that the services which the first respondent rendered in the form of warehousing included the storing of the property, their preservation against deterioration and protection against theft for the benefit of the applicant. It goes without saying that in order to do this the first respondent by warehousing the property has had to spend money for the storage, preservation and protection of the property against theft. The expenses, which were incurred in order for these services to be rendered, were necessary and without the incurrence of these expenses the applicant's property would have depreciated or perished. It is these very services that the applicant paid the second respondent for without protest.

[24] In *Brooklyn House Furnitures (Pty) Ltd v Knoetze & Sons*¹⁴ it was stated:

'A lien or right of retention, *jus retentionis*, is the right which the possessor of another's thing, on which he has spent money or labour retains the thing in his possession until he is compensated as agreed, or where there was no agreement, for his actual expenses or labour, but at most to the extent of the owner's enrichment. It is simply a defence against the owner's *rei vindicatio* and does not constitute a cause of action. Our law recognizes three (3) types of liens, viz. (1) liens for the storage or preservation of a matter ('salvage liens'), liens for improvements ('improvement liens'), and (3) liens for debts *ex contractu* ('debtor and creditor liens').'¹⁵ (my translation)

And further, the court held:

'Appellant would therefore, for the creation of a salvage lien have been enriched if the respondent's labour and expenses on the furniture were necessary for their preservation and protection.

According to the evidence, Ms. Bond apparently lived on a smallholding outside Johannesburg. Because she had to go to the hospital and apparently had to or wanted to vacate the house, arrangements were made for the removal of her furniture, and not only for

¹⁴ *Brooklyn House Furnishers (Pty) Ltd v Knoetze and Sons* 1970 (3) SA 264 (A) (*Brooklyn House Furnishers*).

¹⁵ *Brooklyn House Furnishers* at 270F-G.

the furniture referred to in the higher purchase contract. At the trial it was not disputed that, if the furniture had been left unattended in the house, anything could have happened to it – it could have been stolen or damaged.

In the light of the circumstances, it could hardly be disputed nor was it disputed that the transport and storage of the furniture were necessary for their preservation and protection and that the respondent's labour and expenses in connection therewith were necessary expenses.¹⁶ (my translation)

[25] It is trite that the law does not exist in a vacuum. Legal principles must be applied to the unique context of each case. While the applicant disputed that the first respondent lawfully exercised a right of retention over the property in terms of a salvage lien in my view it is indisputable that the first respondent spent money preserving and protecting the applicant's property from theft.

[26] Ms Goosen, counsel for the applicant, in articulation of her contentions referred me to the case of *Naidoo v Sanbonani Express Freight*.¹⁷ The facts of *Sanbonani* are distinguishable from the facts of the present case. The issue in *Sanbonani* was whether it was necessary for the second respondent to have stored and insured the goods, which it was required to deliver.

[27] It is common cause between the parties that the applicant was aware that the second respondent was in breach of its obligations to the first respondent in terms of the service agreement at least by 7 September 2023. Notwithstanding the applicant's knowledge of this position, the applicant did not vindicate its property instead on 18 September 2023 it sought to negotiate an agreement to move over the warehousing and storage solution directly to the first respondent and to bypass the second respondent. When this agreement did not materialize the applicant still did not vindicate the property but exacted the services from the first respondent through the second respondent. When the applicant did that by conduct it acquiesced to the storage of the property, its preservation against deterioration and protection against theft. The first respondent expended money and labour in storing the property, preserving it against deterioration and protection against theft, without any applicable

¹⁶ *Brooklyn House Furnishers* at 271F-H.

¹⁷ *Naidoo v Sanbonani Express Freight and another* 2008 (5) SA 530 (D).

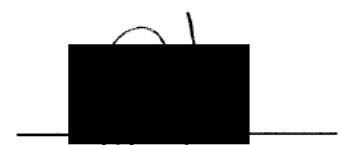
prior contractual relationship between the parties. It is therefore incorrect as the applicant suggests that the first respondent is seeking to assert a debtor and creditor lien under the guise of a salvage lien. Consequently, I am in agreement with Mr *Collingwood* that the first respondent is entitled to retain possession of the property until his enrichment lien has been met alternatively until the applicant has furnished adequate security for the payment of the first respondent's enrichment claim.

Did the first respondent lose control of the property on 11 September 2023?

[28] The applicant contended that when the first respondent released some of the property on 11 September 2023 it relinquished control over the property. It is trite that where a lien holder voluntarily releases the property subject to a right, the lien is lost and remains irrevocably extinguished, and it does not revive if the property at a later stage reverts to his or her control. While it is true that some of the property was released to the applicant on 11 September 2023 it can hardly be said that releasing only part of the property amounted to the relinquishment of control over the property as the first respondent still has control over the remainder of the property. Further, the release of part of the property was not voluntary in the sense that it was pursuant to the written and telephonic exchanges between the representatives of the first respondent and the applicant.

[29] In my view, the applicant failed to show that the first respondent with the full knowledge of its rights decided to abandon its rights to the property whether expressly or by conduct. The first respondent only released part of the property while it retained the remainder of the property which to date is still under its full control.

[30] For all these reasons I dismissed the applicant's application with costs.


CHITHI AJ

APPEARANCES

Counsel for the Applicant : Adv. D. E. Goosen

Instructed by : Scalco Attorneys Inc

Counsel for the First Respondent : Adv. A. D. Collingwood

Instructed by : Dukhi Attorneys Inc

Date of the hearing : 28 November 2023

Date of Reasons for the Order : 28 February 2024