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

CASE NO: 2023-128 281

- (1) REPORTABLE: ~~YES~~ / NO
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO
(3) REVISED. ~~YES~~/NO

In the matter between:

CAROL BEHANE

Applicant

and

ATE AUTOMOTIVE REPAIRS

First Respondent

TRAFFICC (PTY) LTD

Second Respondent

VW HATFIELD

Third Respondent

ABANDONED VEHICLE AND TRUCK SOLUTIONS

Fourth Respondent

COURT ORDER

A. The first and fourth respondents are ordered and directed to make available to and restore applicant's possession of a Hyundai TQ H1 vehicle with registration number K[...], license number VSW 282 W and VIN number K[...], within 10 (ten) days of this order, free of any storage costs.

B. Should the first and/or fourth respondents fail to comply with the order in 1 above, the Sheriff is authorised, and directed to attach the vehicle referred to in 1 wherever it is found and deliver it to the applicant or her attorneys of record, subject to payment of the Sheriff's reasonable costs, which costs shall be part of the costs of suit.

C. The first and fourth respondents are to pay the costs of the applicant, jointly and severally, the one to pay the other to be absolved, with costs of appearance at Scale A.

D. The matter is postponed *sine die* insofar as the second and third respondents are concerned, by agreement between the said parties and the applicant.

JUDGEMENT

INTRODUCTION

(1) This application concerns a motor vehicle purchased by the applicant in December 2021, being a Hyundai TQ H1 with registration number K[...], license number V[...] and vin number K[...] (the vehicle).

(2) At the time the application was launched in December 2023 the applicant sought relief against all four respondents as set out in the notice of motion.¹

¹ Caselines 02-14 and 15, paras 1-5.

(3) At the hearing of the matter Mr Richards, who appeared for the applicant requested that the application should be postponed by agreement between the relevant parties insofar as relief is sought against the second and third respondents. Ms Sheldon who appeared on behalf of these respondents, confirmed the agreement to postpone.

(4) Mr Richards proceeded to argue the relief sought in prayer 2, being the release of the applicant's vehicle by the first and fourth respondents without payment of storage fees.

RETURN OF POSSESSION OF VEHICLE

(5) The applicant purchased the vehicle and shortly thereafter it broke down. A series of events ensued which are not relevant now. The vehicle was sent to various businesses for repairs.

(6) During October 2022 the vehicle started losing power and the applicant took the vehicle to the first respondent's workshop to be fixed and repaired. She was informed that there is not anything wrong with the vehicle except that there is a wire loose and it will cost R1 000-00 (one thousand rand) for labour costs to fix.²

(7) The facts set out in the previous paragraphs were not denied or admitted in the answering affidavit filed on behalf of the first and fourth respondents.³

(8) The said answering affidavit was deposed to by Mr Rowell, a director of the fourth respondent.⁴

(9) Mr Rowell relied on a confirmatory affidavit⁵ by Mr Antonie Lombaard of the first respondent, supported by a resolution of the first respondent in his favour.⁶

² Founding Affidavit (FA), paras 26-27, Caselines 02-4.

³ First and Fourth Respondents' Answering Affidavit (AA), Caselines 02-9, paras 2-3.

⁴ AA, Caselines, paras 1 and 2, 02-9.

⁵ Annexure "AV1b", Caselines 02-22.

(10) It is clear from the facts in Mr Rowell's affidavit and the so-called confirmatory affidavit, that Mr Rowell does not have personal knowledge of what transpired between the applicant and the first respondent. The confirmatory affidavit does not in a proper manner confirm material facts related to the applicant and the first respondent and has no cogency, as found in the **Drift Supersand**⁷ matter in respect of a similarly worded confirmatory affidavit.

(11) Both the first and fourth respondents employed the same attorney in representing them in this application. Mr Rowell further gives evidence on behalf of both first and fourth respondents and refer to them as the respondents.⁸ His evidence on behalf of the first respondent constitutes hearsay evidence as it is not properly confirmed as required by law.

(12) By 11 November 2022, after the vehicle had again broken down, the applicant had further dealings with Boss Auto and the third respondent.

(13) During January 2023 the applicant called the first respondent and informed them that the vehicle had broken down in December 2022, but the second respondent refused to pay for the repairs as the first respondent had previously repaired the vehicle and within one month thereafter the vehicle had broken down again. The first respondent advised that the applicant should tow the vehicle to their workshop and they will fix it, which she did.⁹

(14) On 31 January 2023 the first respondent informed the applicant that they will not fix the vehicle because it is not their fault that the turbo broke down and sent a report to the applicant which alleges that the turbo had contaminated oil.¹⁰ Curiously, Mr Roswell denied the content of paragraph 37 of the founding affidavit, and referred to the

⁶ Annexure "AV1C", Caselines 02-25.

⁷ **Drift Supersand (Pty) Ltd v Mogale City Local Municipality** 2017 JDR 1611 (SCA) at para [31].

⁸ AA, para 2, Caselines 02-9.

⁹ Caselines, FA, para 37, 02-27 and 28.

¹⁰ Caselines, FA, para 38, 02-28.

report on the turbo, but admits the content of paragraph 38 of the founding affidavit where the applicant refers to the report on the broken turbo. The report was prepared by a business called Turboxtreme. The same report is Annexure “A4” (Caselines 02-38) to the answering affidavit.

(15) During March 2023 the applicant made application to the Motor Industry Ombudsman of South Africa (MIOSA) in an attempt to get the vehicle replaced by the third respondent. The claim was rejected.¹¹

(16) On 29 June 2023 the first respondent sent an email to the applicant with a quote (described by the applicant as an ‘invoice’) advising that the cost of repairs was R17 261-00.¹² There was no cost indicated for storage. The email was sent by Mr Francois Lombaard on a “without prejudice” (*sic*) basis and referred to the attached final quote with the following note: “*Please note the vehicle will be sent to legal storage by seventh July 2023*”.¹³

(17) On 3 July 2023 the applicant advised the first respondent that she had reported the matter to the National Consumer Commission, but that she would arrange to collect her vehicle.¹⁴ This was admitted in the answering affidavit.¹⁵

(18) The applicant then went to the first respondent’s office during the period leading to 7 July 2023 with members of the South African Police Service to collect her vehicle, but when she got there, the vehicle had already been sent to the storage without her consent.¹⁶ These facts are admitted in the answering affidavit by Mr Rowell.¹⁷

¹¹ Caselines, FA, para 43, 02-29.

¹² Caselines, FA, para 42, 02-28; Annexure “CB6”, Caselines 02-45; Annexure “CB7”, Caselines 02-46.

¹³ Caselines, Annexure “CB6”, 02-45.

¹⁴ Caselines, FA, para 45, 02-29.

¹⁵ Caselines, AA, para 36, 02-18.

¹⁶ Caselines, FA, para 46, 02-29.

¹⁷ Caselines, AA, para 36, 02-18.

(19) The applicant was informed by the first respondent that the vehicle was already at storage when she said she had come to collect the vehicle. She was then contacted by a person from the fourth respondent and was sent a form to sign.¹⁸

(20) The applicant refused to sign the form as she has not contracted with them, nor did she know whether they indeed had the vehicle. The person refused to disclose the fourth respondent's address until the applicant has signed the form.¹⁹

(21) A further email from the applicant did not evoke a response from the fourth respondent.

(22) The applicant states that she requested the first respondent, to whom she gave the vehicle, to get same so that she will be able to collect it, but the first respondent refused to co-operate with her.²⁰

(23) The applicant states that she will suffer irreparable harm if she is not granted relief as she is still paying for the vehicle through vehicle finance. She is adamant that she did not consent to the vehicle being sent to legal storage.²¹

(24) In the answering affidavit the respondents, which have made common cause with each other, admitted that the vehicle would not be released as the applicant had failed to make payments as requested to do and to honour the enrichment lien held by the fourth respondent in that the fourth respondent has incurred costs on the applicant's behalf which costs accumulates on a daily basis.²²

(25) Insofar as it has already been pointed out that the first respondent's confirmatory affidavit has no cogency, there is no clear, convincing evidence by the first

¹⁸ Caselines, FA, para 47, 02-30.

¹⁹ Caselines, FA, para 48, 02-30.

²⁰ Caselines, FA, para 50, 02-30.

²¹ Caselines, FA, para 51, 02-30.

²² Caselines, AA, para 40, 02-19.

respondent on record. As to the various dealings between the applicant and the first respondent, the evidence of the applicant is accepted.

(26) The answering affidavit was filed out of time and as a result the respondents applied for condonation of the late filing.²³ In her replying affidavit the applicant opposed the granting of Condonation on substantive and valid grounds. Due to the view, however, that the court takes of the value, or lack thereof, of the evidence and the recent more accommodating stance the courts take to hear all the parties, it will be allowed subject to the observations and reservations already set out above as to relevance and evidentiary value.

(27) The main point of resistance and/or defence raised in the answering affidavit is a written cession agreement purportedly entered into between the first and fourth respondents.²⁴

(28) This cession agreement was signed on 14 July 2023 between the first and fourth respondents in terms of which the first respondent ceded its claim against the applicant to the first respondent.²⁵ Mr Rowell, the deponent to the respondent's answering affidavit, further contends that the applicant "correctly asserted in paragraph 42 of her founding affidavit that the vehicle had been in the first respondent's storage facility for 6 to 7 months and accumulated storage fees daily, which fees the applicant failed to pay upon demand."²⁶

(29) Apart from the fact that the said statements of Mr Rowell are hearsay evidence and of no evidentiary value, he does not paraphrase correctly what the applicant states in paragraph 42 of her founding affidavit. The applicant stated that she received an email dated 29 June 2023 from the first respondents containing an attachment of an

²³ Caselines, AA, paras 5.1-5.4, 02-10 to 11.

²⁴ Caselines, AA, para 7, 02-11.

²⁵ Caselines, AA, para 7, 02-11; Annexure "AV3", 02-26 to 32.

²⁶ Caselines, AA, para 8, 02-11.

invoice²⁷ which is not for storage fees, but repairs. The email referred to by the applicant referred to the attached final quote (for repairs) and added that the vehicle will be sent to legal storage by 7 July 2023.

(30) Mr Rowell also contended, right at the end of the answering affidavit, that the applicant will not suffer irreparable harm as she has for almost 7 to 8 months not made it a priority to secure her vehicle or make payment for repairs to have been done on her vehicle when the debt on the vehicle was ceded to the fourth respondent.²⁸ These contentions of Mr Rowell are not only hearsay, but are contradicted by the facts. The facts found by the court are:

(30.1) The applicant went to the first respondent's premises prior to 7 July 2023, whilst the cession is dated 14 July 2023.

(30.2) The applicant only received a quote for repairs on 29 June 2023 as an annexure to an email warning her that her vehicle will be sent to "legal storage" on 7 July 2023. When she tried to collect her vehicle prior to 7 July 2023, it was already removed from the first respondent's premises.

(30.3) The cession of the claimed enrichment *lien* was only entered into on 14 July 2023. The applicant submitted that this was done as an afterthought. The court agrees.

(30.4) Up to the date prior to 7 July 2023 no agreement was entered into, either tacitly or expressly, between the applicant and the first respondent, in respect of storage fees. Annexure "**AV4a**"²⁹ to the answering affidavit is Invoice No. A 230104 dated 14 July 2023 which indicates the customer's name as "Abandoned", and not the applicant's name, and is addressed to the email of the fourth respondent. It indicates that it is for "Debt seeded" (*sic*) and indicate charges for "strip and quote" in the amount of R6 500-00 and "Storage" in the amount of R4 000-00. It is again an invoice prepared as an afterthought, as submitted by the applicant, and never rendered to the applicant. The debt ceded

²⁷ It was already pointed out above that Annexure "**CB7**" (02-46) was Quote No. EST 230184 for the amount of R17 261-00, for the turbo replacement.

²⁸ Caselines, AA, para 39, 02-18.

²⁹ Caselines, 02-33.

by the first respondent to the fourth respondent is declared to be R17 000-00.³⁰
The contradiction in the facts is clear.

(31) Mr Rowell states the maternal terms of the cession agreement in the answering affidavit and alleges that the fourth respondent complied with the terms of the cession agreement and that it paid the agreed amount. Reliance is placed on the invoice “**AV4a**” already referred to above and proof of payment.³¹ The proof of payment is a largely redacted ABSA statement of Repossession Solutions (Pty) Ltd, and not the fourth respondent. The legible part of this statement shows a payment of R 10 500 on 25 July 2023, but the document as uploaded is not legible in respect of the entity who made the payment.

(32) On the aforesaid basis, Mr Rowell submits that the fourth respondent obtained all the first respondent’s rights against the applicant and towed the vehicle from the first respondent’s premises as security for its claim against the applicant for safekeeping into its storage facility at a daily fee,³² which, as at 10 April 2024, amounted to R237 000-00.³³

THE APPLICANT’S CASE

(33) The applicant has submitted that the cession agreement is invalid and cannot form the basis of a claim against her. She has denied Mr Rowell’s statement about her debt which was referred to above and she stated that there never was a time that she was indebted to either the first or fourth respondents in the amounts alleged by Mr Rowell. She submitted that the cession agreement was not a valid cession.

(34) Mr Richards, in argument on behalf of the applicant, relied on the facts as set out above, and emphasised that the applicant only became aware of the cession

³⁰ Caselines, 02-31, which purports to be an (uncommissioned) “statement under oath” by Anton (Lombaard) who declares, among others, that an invoice was sent on 29 June 2023.

³¹ Caselines, Annexure “**AV4b**”, 02-34.

³² Caselines, AA, para 11, 02-12.

³³ Caselines, Annexure “**AV4c**”, 02-35.

agreement when she received the answering affidavit. He emphasised that the vehicle was already removed by the time the applicant arrived at the first respondent's premises. This is common cause.

(35) It was submitted that the applicant relied on the *rei vindicatio*, which is the claim of an owner who seeks return of the property. It is not dictated by whether the owner may lawfully possess the property or not. In support of these submissions, he relied on the matter of Hume.³⁴

(36) It was then also submitted that a *lien* is a reference to a right of retention which arises from the fact that one man has put money or money's worth into the property of another.

(37) It is common cause that the applicant is the owner of the vehicle that forms the subject of this application. It is further common cause that, at the commencement of these proceedings, the vehicle was in possession of the fourth respondent. It is also common cause that the vehicle is still in existence. This being so, the *rei vindicatio* is the appropriate procedure to vindicate the vehicle.³⁵

(38) The question then is what the effect is of the fourth respondent's claim to a *lien* as a result of the belated cession agreement between the first and fourth respondents to which the applicant was not a party, nor was she aware of it?

(39) Further, does an agreement exist between the applicant and the first respondent in respect of any repairs or storage costs? From the analysis of the facts as set out above, it is clear that the cession agreement was an afterthought, that there was no agreement between the applicant and the first respondent as to any repairs (or to strip and quote) and in respect of storage costs. The invoice issued by the first

³⁴ **Hume v Directorate of Priority Crime Investigation and Another** 33593/20 [2022] ZA GPP HC 33 (28 January 2022).

³⁵ **Concor Construction (Cape) (Pty) Ltd v Sanlambank Ltd** 1993 (3) SA 930 (A); **Chetty v Naidoo** 1974 (3) SA 13 (A).

respondent on 14 July 2023³⁶ was not based on any agreement between the applicant and the first respondent. It was also issued as an afterthought to provide a purported basis for the cession, although the claim ceded was R17 000-00³⁷ and not for the amount of the belated invoice.

(40) It is therefore found, insofar the cession agreement exists, that it does not bind the applicant. A person exercising or claiming a *lien* is not entitled to storage costs merely for keeping the property on his premises. No value is added to the property by merely keeping it safe.³⁸

(41) The quote provided to the applicant on 29 June 2023 was to repair the vehicle and not for storage. The first respondent had the vehicle since the end of January 2023 and only provided the quote on 29 June 2023.

(42) In the circumstances, it is not necessary to decide whether the cession is a binding contract. If it is binding, it is only between the first and fourth respondents.

(43) What is consequently found is that the cession agreement does not bind the applicant and was entered into under circumstances which cannot serve to frustrate the applicant's *rei vindicatio* relief. She went to collect her vehicle prior to 7 July 2023 which is the date from which the first respondent state it would be sent for "legal storage", just for the applicant to find that the vehicle was not on the first respondent's premises any longer.

(44) Mr Richards argued on behalf of the applicant that any agreement between the applicant and the first respondent was for repairs and not storage. In my view there is no evidence that the applicant accepted the quote of 29 June 2023 as she decided to remove her vehicle.

³⁶ Annexure "AV4c", Caselines 02-35.

³⁷ Annexure "AV4a", Caselines 02-31 under para 2.

³⁸ **Steenkamp v Bradbury's Commercial Auto Body CC**, Case No. 2882/2019, [2020] ZA LMPPHC 9 [23 January 2020] at [18].

(45) Ms Crisp who appeared for the respondents, submitted that the applicant entered into an oral agreement with the first respondent on 23 January 2021 to assess/diagnose the repairs that need to be done to the applicant's vehicle and provide a quotation for acceptance.³⁹ No evidence to that effect appears in the answering affidavit and there is no factual basis for these submissions.

(46) Further submissions that were made on behalf of the respondents are contradicted by the facts as found to be proven by the evidence of the applicant. Mr Rowell, the deponent to the answering affidavit, has no personal knowledge of what transpired between the applicant and the first respondent between January and 7 July 2023. The evidence of the applicant in this regard is clear and uncontested.

(47) Ms Crisp also stated that the fourth respondent has instituted action against the applicant for the debt allegedly owed by her and contended that *lis pendens* has been created in this matter. Mr Richards informed the court that such action was instituted months after this application was brought.

(48) The said aspect was not raised in the answering affidavit, and no evidence was placed before the court of such action. In any event, one of the requisites for a plea of *lis pendens* is that the other matter must be in respect of the same subject matter.⁴⁰

(49) This application is for recovery of possession by the owner of her vehicle, whilst the other action can only be a claim for the alleged storage costs. One of the requisites for a plea of *lis pendens* is therefore absent and the respondents' argument cannot succeed.

CONCLUSION

³⁹ Respondent's heads of argument, Caselines 19–17, paras 4.1 and 4.2.

⁴⁰ **Williams v Shub** 1976 (4) SA 567 (C).

(50) Consequently, an order in terms of prayer 2 in the notice of motion should be granted in favour of the applicant.

(51) The applicant sought costs in the event that the application is being opposed. The applicant is therefore entitled to a costs order against the first and fourth respondents who opposed the relief in prayer 2.

(52) I therefore make the order as set out above.

LM du Plessis

Acting Judge of the High Court

Gauteng Division

Johannesburg

REPRESENTATION

For the applicant: Appearance: **Mr F Richards** as practicing attorney
with right of appearance.

Attorneys: **Mahlabane M Attorneys Inc.**

First and Fourth Respondents: Appearance: **Ms R Crips**

Attorneys: **Ruth Crisp Attorneys**

Second and Third Respondents: Appearance: **Ms MI Sneddon**

Attorneys: **Jansen van Rensburg and Partners Inc.**

Date of Hearing: 26 February 2025

Date of Judgement: 18 August 2025