

SOUTH AFRICA / JUDGMENT

ABSA Bank Ltd v Robin's Mobile and Fleet Maintenance CC (11956/2011)

[2011] ZAKZDHC 41 (5 April 2011)

[2011] ZAKZDHC 41

COURT
Kwazulu-Natal High Court, Durban

BEFORE
Ndlovu

CASE / FILE NUMBER
11956/2011

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IN THE KWAZULU - NATAL HIGH
COURT, DURBAN
REPUBLIC OF SOUTH AFRICA
CASE NO. 11956/2011
In

the matter between: ABSA
 BANK LIMITED
 Applicant
 and
 ROBIN'S
 MOBILE & FLEET MAINTENANCE CC
 Respondent

JUDGMENT

NDLOVU J

[1] This matter was argued before me on 31 March 2011 being the extended return date of the rule nisi granted by the court on 29 October 2010.

[2] The rule nisi incorporated interim relief in the following terms:

“1.1. Directing the Respondent forthwith to deliver to the Applicant alternatively the Deputy Sheriff for the area in which the under mentioned truck tractor may be found assisted by the Applicant, certain truck tractor described as:

2004 Volvo Self Propelled Heavy load, truck tractor,

Registration No. ND 191 514, Engine No. D 124 29088

Chassis No. YV2 J4 CMC 142847401

(hereafter ‘the vehicle’)

Against delivery to the respondent of the bank guarantee for payment of the sum of R5 650,64 (Five Thousand Six Hundred and Fifty Rand Sixty Four Cents), together with interest thereon at the mora rate of 15,5% per annum reckoned from 1 March 2010 to date of service of these papers by the Deputy Sheriff aforesaid, and being Annexure ‘ABSA1’ to these papers

Ordering the Respondent immediately to disclose to the Sheriff and the Applicant the precise whereabouts of the vehicle and precise place of the alleged storage facility wherein the vehicle may be found.

1.3. Ordering the Sheriff or his Deputy forthwith to deliver the vehicle to the Applicant at a place nominated by the Applicant.

1.4. Directing the Respondent to institute action against the Applicant in a competent Court for recovery of any claim it alleges

it has for storage fees of the vehicle within 30 (thirty) days of confirmation of the rule with or without modification and failing

which the claim for storage fees will, as against the Applicant, lapse.

1.5. Ordering the Respondent to pay the costs of this application.

That the orders referred to in paragraphs 1.1, 1.2, and 1.3 hereof do operate as interim orders pending the return day or any extension thereof.”

[3] It is common cause that on or about 18 November 2008 the applicant sold the vehicle to a corporate entity known as Reefer Logistics CC (“Reefer”) in terms of an instalment sale agreement (“the Agreement”) whereby Reefer would pay certain monthly instalments towards the debt on the vehicle. In terms of the Agreement ownership of the vehicle would remain with the applicant until such time that the debt was fully discharged by Reefer.¹

[4] On or about 1 July 2009 the applicant instituted legal action against Reefer at the Pinetown magistrate’s court after Reefer had allegedly failed to pay the specified monthly instalments to the applicant in terms of the Agreement. Upon the respondent having failed to respond to the summons, default judgment was granted by the magistrate’s court against Reefer on 6 October 2009, in the following terms:

“1. An order confirming the plaintiff’s cancellation of the AGREEMENT.

2. An order authorising and directing the Sheriff of the Court and/or his Deputy, to seize and take into his custody and thereafter to hand over to the plaintiff or its nominated agent the vehicle.

3. Costs on the scale as between attorney and client, to be taxed.”

[5] For the reasons indicated in his return of service dated 28 October 2009, the sheriff was unable to execute the warrant of delivery (issued on the strength of the default judgment aforesaid), that is, to remove the motor vehicle from the possession of Reefer and handing it over to the applicant. Hence, the vehicle remained in the possession of Reefer then.

[6] It appeared from the papers that, in the meantime, the vehicle encountered mechanical problems which resulted in Reefer taking it to the respondent for repairs. It was common cause that the respondent, a close corporation, conducted business as a garage or

workshop. This is how the respondent got into the picture in this matter. According to the answering affidavit the respondent undertook

the repairs on the vehicle.

[7] The respondent apparently complained about Reefer’s failure to pay for the repairs which were effected by the respondent

on the vehicle. It was on this basis that the respondent sought to claim the right of retention over the vehicle pending payment of a specified sum of money (set out hereunder), being for repairs and storage charges. What follows gives an illustration of how the respondent sought to justify its claim of a legal right to retain the vehicle in its possession until the amounts allegedly owed to the respondent by Reefer were paid in full.

[8] An affidavit deposed to on 30 August 2010 by one Sevandran Pillay, apparently the managing member and authorised representative of the respondent, was attached to a letter dated 30 August 2010 addressed to the applicant by the respondent’s attorneys. The letter aforesaid was marked “without prejudice”, although, it may be pointed out, there was nothing in its contents to indicate or suggest an attempt towards any settlement of the dispute or other grounds that justified such marking. Mr Tobias, for the applicant, submitted that an affidavit has never been a “without prejudice” document and further that, in any event, there was no legal reason why the contents of both the letter and the affidavit should not be disclosed to the court. Mr Govender, appearing for the respondent, correctly conceded during argument that both the letter and the affidavit were indeed not “without prejudice” documents.

[9] In the said affidavit Mr Pillay set out the account of events which led up to the stage that the applicant instituted this litigation. It seems to me apposite to refer to the pertinent provisions of Mr Pillay’s affidavit and I propose to do so presently:

“5 The vehicle was first brought to my workshop circa the 20th of May 2009 for inspection, repair and maintenance. A significant amount of work was then carried out on the vehicle engine with the fees for my work amounting to R 147, 656.59.

6 The vehicle was brought in by Mr SK Govender the proprietor of Logistics who undertook to pay my fees once the vehicle received its first payment.

7 I was advised that the vehicle was being managed / run by one Desigan S Naicker, who had secured a contract for the vehicle and

required same to be repaired as quickly as possible in order to meet the terms of the contract. I was under the impression DS Naicker is a partner to GS Naicker at Logistics.

8 The work was duly completed as soon as possible and the vehicle returned to Logistics on the 19th of June 2009 together with our invoice, with the expectation that I would receive my payment within a short time.

9 Since some time had elapsed, and my payment was not forthcoming, I attempted to contact Logistics and SK Govender in order to demand my payment.

10 Despite several undertakings, no payments have been forthcoming.

11 Thereafter circa the 28th of February 2010 a driver who informed me that he worked for Kevin (SK Govender) drove the abovementioned vehicle to my premises for further repairs to the gearbox as the vehicle was not accepting / acquiring the requested gear.

12 I spoke to Kevin via the driver's cellular phone and requested payments, which he once again undertook to make.

13 I duly removed and stripped the gearbox for inspection and then called Kevin to advise him of my assessment of the problem to his vehicle gearbox and advised him that I would not continue further work until my fees for the work done and services rendered in June 2009 was paid in full and further until he paid me a deposit for the work that I was instructed to carry out at that juncture to the gearbox.

14 I once again received empty promises regarding my payment and I then informed Kevin that I would not release the vehicle from my premises until I was paid in full. The vehicle remains in my possession to date as a result of failure to pay my fees.

15 As a result of the vehicle being left at my premises at my workshop I was constrained to remove same to another storage facility

as I necessarily required the space to work on current repairs for which I was being paid. I am constrained to pay for storage cost out of my pocket and the said vehicle is now causing me to suffer further loss, as evidenced by my invoice.”

[10] Apart from the repair charges of R 147 656.59 referred to in paragraph 5 of Mr Pillay's affidavit² the respondent further charged Reefer the sum of R 18 360.00 (annexure M) for storage of the vehicle for the period 1 March 2010 to 31 July 2010 (153 days at R120.00 per day) and R5 650.64 (annexure L) for removing gearbox and "diagnosis" of the mechanical problem after the vehicle was brought back on or about 28 February 2010. It is noted that in terms of the respondent's

answering affidavit the storage charges had increased from R18 360,00 to R34 920.00 as at the date of the answering affidavit (that is, 22 December 2010). The respondent's invoices (supposedly annexures A1 and A2) were, however, not attached to the answering affidavit, as alleged³ (see Paragraph 6(d) of the respondents answering affidavit.

[11] It is apparent from paragraph 14 of Mr Pillay's affidavit that the respondent laboured under the impression that as long as Reefer did not pay the money allegedly owing to the respondent then the respondent had the right of retention of the vehicle.

[12] The true position, however, is that the owner of the vehicle is the applicant and not Reefer. Therefore, regardless of whatever dispute exists between the respondent and Reefer the court is required to determine whether, in the circumstances of this case,

the applicant, before it can be entitled to the return of the vehicle, is liable to pay to the respondent –

12.1 The amount of R 147 656. 59 for "repairs" in terms of the invoice dated 19 June 2009 (annexures H1, H2 and H3)

12.2 The amount of R 5 650.64 in terms of the invoice dated 1 March 2010 for "removing gearbox and diagnosing" (annexure L)

12.3 The amount of R 18 360.00 for "storage" in terms of the invoice dated 31 July 2010 (annexure M), or the alleged updated amount of R34 920.00 aforesaid.

[13] 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."⁴ It constitutes the right to retain physical control of another's property in order to secure payment of a claim for expenditure of money or monetary value by the possessor of the property, until the claim has been satisfied.⁵

[14] Debtor and creditor liens constitute a right of retention conferred on someone who has done work on the property of another or undertaken some service in terms of a contract.⁶ This type of lien secures the amount owed and covers all expenses incurred upon the property in order to fulfil their contractual obligations.⁷ The lien then enables the possessor to remain in possession until the expenses that he has incurred have been compensated.⁸

[15] Therefore, it is trite that, unless there is evidence to an agreement to the contrary, once an object retained by a creditor as security for debt under a lien, is released to the debtor the lien is immediately destroyed and cannot automatically be revived and relied upon by the creditor at a later stage. In *Oceana Leasing Services (PTY) Ltd v BG Motors (PTY) Ltd*⁹ the court stated as follows

“The motor vehicle was released to the said Chetty even although the charges due in respect of the particular repairs had not been paid and there is no suggestion that any reservation or conditions were imposed on such release or that it was regarded as a temporary release from the possession of the respondent. There is no suggestion further that such release was due to fraud, duress or mistake. In such circumstances, it is clear, on the authorities, that the right of retention is lost or extinguished and does not automatically revive if possession of the vehicle is again regained. Gazide and Another v Nelspruit Town Council (supra at 53); Martinus v Taljard 1952 (1) SA 49 at 53-54; Muller and Another NNO v Bryant & Flanagan (Pty) Ltd 1976

(3) SA 210 (D) at 220; *Rondalia Bank Bpk v Pieter Nel Motors (Edms) Bpk* 1979 (4) SA 467 (T) at 470; *Van der Merwe Sakereg* at 511.”

[16] In the present instance there was no suggestion that when the respondent released the vehicle to Reefer on 19 June 2009 the said release was on a temporary basis or that there was an agreement between the parties that upon failure by Reefer to pay the

amount due then the lien would be revived. The consequence therefore is that when the vehicle was released the respondent's lien over it was immediately extinguished and it was not revived when the vehicle was brought back to the respondent on or about 28 February 2010.

[17] I think the legal position on this aspect was clearly stated in *Marinus v Taljaard*¹⁰:

“In the present case there was no contractual pledge: the respondent merely claims a right of retention. A lien is not a conventional mortgage. It is a right tacitly conferred by law upon a person who is in possession of the property of another of which he has expended money or labour of retaining possession of the property until he has been duly compensated (Willie Principles of South African Law (3rd ed., pp. 230, 231)). The considerations which apply to cases of conventional pledge do not necessarily have equal application to

rights of retention tacitly conferred by law. In my judgment the correct view to take is that once a right of retention is lost

consequent upon the creditor's voluntary surrender of possession, the lien is thereby destroyed and that it does not, in

the absence of further tacit or express agreement, thereafter revive merely upon the article's coming again into possession of the creditor. In the words of Story, Agency, sec. 367, since lien is a right founded upon possession, it must ordinarily cease when possession ceases....” (at 53H54A)

- [18] It has also been held that a lien for storage is not maintainable at our law. In *Trust Bank van Afrika Bpk v van der Walt N.O.*¹¹ the court determined the claim of lien for storage charges as follows (translated version):

“There is no agreement to pay storage. Storage can, therefore, not be claimed ex contractu. If it is claimable it must be on the ground of enrichment. The applicant is not enriched by the storage of the lorry. Respondent had a claim against the applicant for the repair of the lorry and he held the lorry as security for the payment of those repairs. After completion of the repairs the respondent could immediately have claimed the amount due from applicant and if applicant failed to pay, the respondent could have sued him for the amount due. The debtor is not enriched by costs incurred by the creditor as a result of his omission to claim, just as interest on an outstanding amount of money cannot be claimed. Storage cannot be claimed in these circumstances. If respondent foresaw storage as a result of late payment he should have stipulated for that.” (at 170F-H)

- [19] In a Full Bench decision in *Wessels v Morice*¹² the court stated, in part:

*“But, after the permit had been obtained, and the cattle could have been returned it appears to us that, though quite within his rights in refusing to part with them until his expenses were paid, holding as he did on account of the owner who had asked for their return, the plaintiff, in these circumstances, was debarred from making any further charge for keeping the cattle merely to enforce his lien (see *Somes v. British Empire Shipping Co.* [1860] EngR 761; , 8 H.L.C., 338). In the case cited the question was whether a person, who having a lien upon a chattel, chose to keep it for the purpose of enforcing*

his lien, could make any claim against the proprietor for so keeping it. The House of Lords was decidedly of opinion that he could not, and on principle we take the same view.” (at 117)

- [20] The court, in another Full Bench decision, confirmed *Wessels*, supra, on the principle that “no person has by law a right to add to his lien upon a chattel a charge for keeping it until the debt is paid.”¹³ In *Harrison N.O. v. McClelland*¹⁴ the following was said:

“The other item is a sum of £8 17s. 6d. for garaging the car. When and where the respondent garaged the car, does not appear. She made no claim for it in her statement of 27th October. So far as appears (and the applicant in her replying affidavit avers), this sum was incurred for garaging the car subsequent to the applicant claiming possession of it and during the time when the respondent was retaining possession of it in the exercise of the lien she claimed. If this is so, my view is that she is not entitled to present a claim for the cost of garaging incurred,

in effect, in her own interests in order to retain possession in the exercise of her lien.” (at 24A)

- [21] Mr Govender conceded, correctly so in my view, that (1) there was no agreement between the respondent and Reefer, express or tacit, at the time the respondent voluntarily released the vehicle to Reefer on or about 19 June 2009 that if Reefer failed to render payment the lien would be automatically revived and (2) that whilst the respondent was keeping the vehicle the respondent would be entitled to the payment of storage charges. According to Mr Govender the respondent’s submission was only that Reefer kept on making empty promises to pay. Then, if that is the case, the respondent cannot rely on a lien to keep the vehicle.

Indeed, it is clear that the respondent was not entitled to claim any of the alleged amounts ex contractu, but could only claim on the basis of undue enrichment.

- [22] The applicant has accepted that the respondent is entitled to R 5 650.64 in respect of the charges relating “removing gearbox and diagnosis” which was undertaken on the vehicle by the respondent after 28 February 2010. To that amount the applicant was prepared to have interest gratuitously added thereon at 15.5% per annum reckoned from 1 March 2010 (being the date of the invoice of that amount). For this amount plus interest as aforesaid, the applicant tendered payment by means of a bank guarantee attached to the notice of motion,¹⁵ against delivery of the vehicle to the applicant in terms of paragraph 1.2 of the order prayed in the notice of motion. Indeed, there is no reason to suggest that the owner of property is not entitled to give security for debt owed for the purpose of defeating a claim for the lien holder.
- [23] The applicant denied that the storage of the vehicle by the respondent enriched the applicant in any manner. To my mind, the respondent has not been able to prove otherwise. In the circumstances, I am inclined to find that questions 12.1 and 12.3 above should be answered in the negative and that question 12.2 be answered in the affirmative.
- [24] Accordingly I am satisfied, on the papers, that the applicant has made out its case against the respondent, which entitles the applicant to confirmation of the rule nisi. If the respondent wishes to pursue its claim for recovery of the repair charges in the amount of R 147,656.59 and other incidental charges, if any, it is free to institute an action against Reefer for the recovery of those monies.
- [25] In the event, the rule nisi is hereby confirmed.

Date of hearing : 31 March 2011

Date of judgment : 5 April 2011

For the Plaintiff : Mr DG Tobias

Instructed by : Johnson and Partners

For the defendant : Mr PM Govender

Instructed by : Sandra Ramjith & Company

¹Clause 4 of the Agreement

²See also annexures H1, H2 and H3 to the applicant’s founding affidavit

³See para 6(d) of the respondent’s answering affidavit

⁴United Building Society v Smookler’s Trustee and Golombick’s Trustee 1906 TS 623 at 627 – 628; Badenhorst et al Silberberg and Schoeman’s The Law of Property 5 ed , at 412

515(2) LAWSA 49

6Silberberg 412

715

(2) LAWSA 68

8Silberburg 413

9 1980

(3) SA 267 (W)

10 1952

(1) SA 49 (C)

11 1972

(3) SA 166 (C)

12 1913 NPD 112

13Longpan Salt Co Ltd v Blumenfeld 1922 177, at 181

14 1955

(3) SA 20 (D)

15Annexure “ABSA 1”

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