

SOUTH AFRICA / JUDGMENT

Mgadi v Calu and Another (1559/16) [2017] ZAECMHC 14 (13 June 2017)

[2017] ZAECMHC 14

COURT

Eastern Cape High Court, Mthatha

BEFORE

S M Mbenenge

CASE / FILE NUMBER

1559/16

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IN

THE HIGH COURT OF SOUTH AFRICA

(EASTERN

CAPE LOCAL DIVISION, MTHATHA)

CASE

NO: 1559/16

In

the matter between:

SIBONGISENI
MGADI Applicant
and
XOLANI CALU
First
Respondent
TOYOTA FINANCIAL SERVICES (SA)
(PTY) LTD
Second
Respondent

JUDGMENT

MBENENGE ADJP:

- [1] The fons et origo of this application is a purported agreement that was concluded by and between the late Phutuma Mgadi (the deceased) and the first

respondent during the deceased's lifetime, in terms whereof the deceased granted the first respondent the right to use a Toyota Quantum Minibus 2.7 Sesfikile 16S then subject to a credit agreement between the deceased and the second respondent (the motor vehicle) against payment of monthly

instalments (owing by the deceased to the second respondent) by the first respondent. It is not in dispute that the agreement rendered the first respondent liable for the upkeep and maintenance of the motor vehicle whilst using same as taxi to generate an income for himself.

[2] The deceased expired on 4 September 2015. It is also not in dispute that the proceeds of the deceased's life insurance

policy settled the debt owing by the deceased to the second respondent. As of January 2016 the motor vehicle's purchase price owed to the second respondent had been paid in full. But for his demise, the deceased would, at that point, have been

entitled to the registration of the motor vehicle into his name which, hitherto, had been owned by the second respondent.

[3] By letters of authority duly issued on 5 October 2015, the applicant was appointed executor of the estate of the deceased and thereby authorised to, inter alia, "take control of the assets of the estate of [the deceased]." Pursuant thereto, the applicant endeavoured to retrieve the motor vehicle from the first respondent. When that endeavour yielded nought, the applicant resorted to the instant proceedings seeking, inter alia, an order directing the first respondent to return the motor vehicle to him, the intention of the applicant being "to distribute [the motor vehicle] for the benefit of the beneficiaries in the estate of the deceased."

[4] The applicant also seeks an order setting aside any agreement that may have been concluded between the first respondent and the deceased regarding the possession of the motor vehicle and any "subsequent sale agreement between the deceased and the first respondent regarding the ... motor vehicle." For reasons that will become clearer, hereinafter, these prayers are not apposite.

[5] In opposition to the application the first respondent asserts that he is entitled to retain possession of the motor vehicle in order "to secure [his] lien in respect of ...expenses incurred in the total sum of R215 740.00." He claims to have incurred the expenses "in the form of the ordinary services, repairing expenses and/or necessary expenses in order to render it to be fit and proper for the purpose for which it was intended." His claim, so the first respondent's case goes, is possessory "until reimbursement in terms of the lien." The second respondent, having been cited purely out of caution, has remained supine.

[6] It is clear from the foregoing that the first respondent (the respondent) is not laying claim to the motor vehicle pursuant to any sale agreement, as indeed there was no such agreement.

- [7] The applicant's claim is in the form of a *rei vindicatio*. The respondent is at peace with the fact that the motor vehicle belongs to the deceased's estate. He is, however, seeking to rely on a right to possession of the motor vehicle. It is plain from a reading of the papers that the requisites for a *res vindicatio*[1] have been fulfilled, leaving it incumbent on the respondent to prove the right to possession.[2]
- [8] It is trite law that salvage and improvement liens (which is what the first respondent seeks to assert)[3] provide dilatory defences against a *rei vindicatio*. If successfully raised, the person claiming may not recover possession of the property from a person who is lawfully in possession and who has an underlying valid enrichment claim unless and until the person from whom possession is claimed has been compensated.[4]
- [9] It now remains to consider whether the respondent has proved the requisites for a lien namely, lawful possession of the motor vehicle;[5] that the expenses were necessary for the salvation of the thing or useful for its improvement; the actual expenses incurred and the extent of the enrichment of the applicant (both have to be given because the lien covers the lesser of the two amounts); that the applicant's enrichment is *iniusta*; and that there was no contractual agreement between the parties (or a third person) in respect of the expenses.[6]
- [10] On the respondent's own showing, his entitlement to retain possession of the motor vehicle flows purely from his alleged right to a lien. No other right to possess is claimed.
- [11] Ordinarily, credit agreements do not permit debtors to enter into the sort of agreement that the deceased and the respondent concluded. There are no facts from which it could be gleaned that in this instance there was such an ouster clause, hence this aspect of this case is considered not dispositive of the matter.
- [12] The respondent has contented himself with averring that he expended the sum of R215 740.00 to render the motor vehicle fit and proper for the purpose for which it was intended (taxi business). But this is an unsubstantiated conclusion of fact. No specificity is given regarding how the amount is arrived at, nor has the respondent shown that the estate has thereby been enriched, and if so, what the extent of such enrichment is. For all we know, the use of the motor vehicle by the first respondent may have even generated an income for himself far more than the expenses he has allegedly incurred.
- [13] *In hoc casu*, according to the respondent, there was, as already pointed out, an agreement that the respondent would be liable for the upkeep and maintenance of the motor vehicle. That disqualifies the respondent from claiming a right to possession pursuant to a lien because the requirement that there must not have been any contractual agreement between the parties in respect of the expenses has not been fulfilled.

[14] I am accordingly of the view that the respondent has not proven the requisites for the lien relied on. His continued retention of the motor vehicle is thus not justified.

[15] In the circumstances, I grant the following order:

- (a) The first respondent is directed to forthwith return the motor vehicle to the applicant.
- (b) Costs of this application shall be borne by the first respondent.

S M MBENENGE

ACTING DEPUTY JUDGE PRESIDENT

HIGH COURT, MTHATHA

Counsel for the applicant: D Skoti

Instructed by: Messrs Bavu Attorneys

MTHATHA

Counsel for the first respondent: J J Bembe

Instructed by: Manitshana Tshozi Attorneys

Heard on: 08 June 2017

Delivered on: 13 June 2017

[1] Ownership of the thing (Goudini Chrome (Pty) Ltd v MCC Contracts (Pty) Ltd)

[1992] ZASCA 208; 1993 (1) SA 77 (A) 82 and that the respondent is in possession of the thing at the time of the launch of the action (Chetty v Naidoo) 1974 (3) SA 13 (A)

[2] Woermon NO v Masondo 2002

(1) SA 811 (SCA)

[3] As against debtor and creditor liens

[4] LTC Harms Amler's Precedents of Pleading (8th Ed, p240)

[5] Singh v Santam Insurance Ltd 1997

(1) SA 291 (SCA)

[6] Brooklyn House Furnishers (Pty) Ltd v Knoetze & Sons 1970

(3) SA 264 (A) and McCarty Retail Ltd v Shortdistance Carriers CC 2001

(3) SA 482 (SCA)

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