

SOUTH AFRICA / JUDGMENT

Santam Limited v Selby Panel & Paint Proprietary Limited (005540/2022) [2023] ZAGPJHC 776 (15 June 2023) [2023] ZAGPJHC 776

COURT

South Gauteng High Court, Johannesburg

BEFORE

Pearse AJ

CASE / FILE NUMBER

005540/2022

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IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, JOHANNESBURG

Case No: 005540/2022

NOT REPORTABLE

NOT OF INTEREST TO OTHER JUDGES

NOT REVISED

In the matter between

SANTAM LIMITED Applicant And SELBY PANEL & PAINT PROPRIETARY LIMITED Respondent

JUDGMENT

PEARSE AJ:

AN OVERVIEW

1. The applicant, Santam Limited, seeks the release of a motor vehicle over which the respondent, Selby Panel & Paint Proprietary Limited, asserts a salvage lien.
2. It is not in dispute that the applicant has paid most of the respondent's claim for storage charges and, as substitute security, tenders payment into its attorneys' trust account of both the balance of the claim and further daily charges to the date of this court's order. Such security would:

- 2.1. be held in trust pending the final resolution of any legal proceedings to be instituted by the respondent, within 30 calendar days of service of the order, for payment of its alleged storage charges; or
- 2.2. failing such proceedings, be released to the applicant.
3. The respondent argues that substitute security of that nature and order would be inadequate and indeed illusory since the costs and delays of litigation would render it financially unviable for the applicant to be sued for payment of the storage charges.
4. Whilst not insensitive to the impediments to litigation, I am not persuaded that a contender for a contested lien in respect of a disputed claim is in a different position to any other plaintiff; and an ever-escalating claim for storage charges coupled with reciprocal litigation burdens would probably compel an owner to pay the claim lest its property remain in the plaintiff's possession in perpetuity or until the end of litigation.
5. In this case, the merits of the underlying claim are placed in doubt by the applicant – I need not, and do not, express a view in that regard – but, in any event, I am satisfied that the tendered security is adequate in substitution for the respondent's retention of the applicant's vehicle.
6. Hence, for the reasons elaborated on in what follows, I grant the application in the terms set out in paragraph 50 below.

THE FACTS

7. On 14 September 2021 a Volkswagen Polo Vivo motor vehicle bearing registration number CH47HVGP, VIN number AAVZZZ6SZDU0130129 and engine number CLS149483 was seriously damaged in an incident on the side of a road in Kabokweni in Mpumalanga.
8. At that time, the vehicle was insured in terms of a policy issued in July 2021 by the applicant to an insured firm of attorneys (Macbeth Incorporated).
9. On 14 September 2021, at the request of the insured, representatives of the respondent towed the vehicle to its premises in Selby, Johannesburg.
10. It is not in dispute between the parties that the respondent is not an authorised towing or repairing service provider of the applicant.
11. The insured reported the incident to the applicant, which requested the respondent to release the vehicle to its designated representative; but without success.
12. On 17 January 2022 an agreement of loss was concluded between the applicant and the insured, in terms of which the applicant paid R131,575 to the insured and assumed ownership of the salvaged vehicle.

13. On 27 January 2022 the respondent emailed to the applicant an invoice (dated 14 September 2021) claiming payment of a sum of R95,220. The invoice levied storage charges of R600 per day for the period 14 September 2021 to 28 January 2022.
14. The sum invoiced by the respondent was disputed by the applicant.
15. By invoice dated 07 February 2022, the respondent claimed payment of a reduced sum of R43,700, on receipt of which it tendered to release the vehicle to the applicant. The invoice levied storage charges of R250 per day for the period 14 September 2021 to 11 February 2022.
16. The reduced sum invoiced by the respondent was however also disputed by the applicant.
17. Given the resultant impasse, the applicant referred the matter to its attorneys.
18. An offered settlement amount of R26,220 was paid by the applicant's attorneys to the respondent on 11 February 2022.
19. On the same day the applicant's attorneys wrote to the respondent noting that the vehicle was insured by their client, recording that "our client is of the view that the charges raised is not in terms of the industry norms and is excessive", attaching proof of payment of the amount offered in settlement of the invoiced sum, advising that it held "the amount of R17,480 (the balance of your claim) on trust as security", demanding that "[t]he vehicle must be urgently repatriated to be repaired" and advising that it held instructions "to launch an urgent application to court for the release of the vehicle should you not accept our offer of payment of what our client regards as reasonable charges."
20. In response on the same day, the respondent's attorneys contended that "[o]ur client was approached by an assessor saying that an amount of R250 per day excluding VAT will be an acceptable amount to pay" and that "[t]here was a contract between our client and the insured, that agreement still stands and the amount of R43,700, is reasonable."
21. It appears from correspondence exchanged by the attorneys on 14 and 15 February 2022 that a putative settlement was reached between the parties, in terms of which:
 - 21.1. the applicant offered "to settle the matter in good faith an additional payment of R5,244 to total R36,708 for the release of the vehicle";
 - 21.2. the respondent accepted "the proposed amount of R36,708";
 - 21.3. the applicant undertook "to make payment of an additional R5,244"; and
 - 21.4. the respondent replied as follows: "100 percent. Nice doing business with with you Colleagues".
22. An amount of R5,244 was paid by the applicant's attorneys to the respondent on 15 February 2022.

23. In the fortnight that followed, however, a dispute arose between the parties as regards whether a further amount of R5,244 remained outstanding.
24. In the result, the respondent refused to release the vehicle to the applicant.
25. On 05 April 2022 the applicant's attorneys wrote to the respondent's attorneys recording that the applicant (the insurer) had learned that the respondent's firm of attorneys (Macbeth Incorporated) was in fact the insured under the policy of insurance and that the insurer had already made payment to that insured in terms of the agreement of loss. The letter noted an apparent conflict of interests and demanded confirmation that the vehicle would immediately be released by the respondent to the applicant.
26. In response on the same day, the respondent demanded that the applicant make payment of "it's dues".

THE PROCEEDINGS

The affidavits

27. On 08 July 2022 the applicant initiated this application seeking an order:
 - 27.1. directing the respondent to release the vehicle into its possession within 24 hours of service of the order; and
 - 27.2. obliging the applicant to pay the respondent's further storage charges^[1] (calculated at R250 per day from 11 February 2022 to the date of the court order) into the applicant's attorneys' trust account as security pending the final resolution of any legal proceedings to be instituted by the respondent, within 30 calendar days of service of the order, for payment of "its alleged fees for the towing, storage, recovery, administration and security in respect of the vehicle", failing which the entrusted amount would be released to the applicant.
28. Paul Schalkwyk, a motor assessor manager in the employ of the applicant, had deposed to the founding affidavit on the previous day. Besides setting out the applicant's version of the facts of the matter, the affidavit denies any liability to the respondent for any additional storage charges and submits that, "[i]n light of the aforesaid substitute security tendered by the Applicant, the Respondent is obliged to release the motor vehicle." The affidavit also contends for security risks and additional charges for so long as the vehicle remains in the possession of the respondent.
29. On 28 July 2022 the application was served on the respondent, which gave notice of intention to oppose the application on 30 September 2022.
30. Since no answering affidavit was delivered in the ensuing three or four weeks, the applicant's attorneys delivered a notice of set down and a practice note on 24 and 25 October 2022, each of which envisaged an unopposed hearing of the application.

31. The respondent's answering affidavit was however delivered on 02 November 2022. Besides setting out its version of the facts of the matter, the affidavit contends that the respondent possesses the vehicle lawfully qua salvage lienholder in respect of an outstanding balance of R5,244 and denies that the applicant tenders sufficient security for additional storage charges. The respondent adds that it has shown good faith in reducing its claim from R95,220 to R43,700 and then to R36,708.
32. It appears that on 03 November 2022 this application was removed from the unopposed roll by the court (per Flatela AJ) with the respondent ordered to pay the applicant's wasted costs of removal.
33. The applicant's replying affidavit – essentially joining issue with the respondent's contentions – was delivered on 05 December 2022.

The submissions

34. The applicant's counsel, Pieter Oosthuizen, filed heads of argument, a list of authorities and a chronology of events on 15

December 2022. The heads of argument rely on Hochmetals[2] for the submission that, even where a claim in respect of which a right of retention is asserted is made in good faith, a court may, in the exercise of its discretion based on what is equitable in the circumstances of the case, order delivery of property to its owner against provision of adequate security. The respondents' rights are not compromised where the substitute security suffices.

35. On 06 February 2023 counsel for the respondent, Nkateko Tshabalala, filed a practice note, heads of argument and a list of authorities. The heads of argument:

35.1. submit that the sole issue for determination by this court is whether the tendered security suffices to warrant an order of release of the vehicle to the applicant or its designated representative, bearing in mind that, whilst an owner should not be left out of its property unreasonably, it should also not be aided in any intention to delay a possessor's recovery of expenses;[3]

35.2. cite Mancisco[4] as identifying factors of relevance to the exercise of the court's discretion, including that: (a) the substitution of security for payment is a temporary measure and requires a more robust approach than applies in applications for final relief; (b) any objection to substitution should be seriously considered by the court because it is asked to destroy the respondent's "undoubted right" to possess the property; (c) the court must however "properly assess the bona fides of the detentor and the cogency of his evidence about the circumstances which allegedly caused a relationship of lienholder and the extent of the claim which is protected by the lien"; although (d) the court's view in that regard affects only what it should order in regard to security and renders nothing res judicata in the underlying claim;

35.3. argue that, on the tendered substitution of security, it would be financially unviable for the respondent to litigate to recover the balance of its claim hence it would be prejudiced if ordered to release the vehicle; and

35.4. assert that the applicant does not demonstrate the respondent's storage charges to be unjustified or unreasonable.

36. In response to a directive issued by this court, counsel for the parties uploaded a joint practice note and chronology of events on 26 May 2023. As appears therefrom:

36.1. the applicant submits that, as owner of the vehicle, it should not be left out of its property unreasonably and calls on this court to exercise its discretion in favour of substituting the security held by the respondent in the form and manner tendered in the notice of motion; and

36.2. the respondent reiterates that the sole issue for determination by this court is whether the tendered security suffices to warrant an order of release of the vehicle to the applicant or its designated representative.

MY ANALYSIS

37. It is not in dispute on the papers that a salvage lien allows a party to claim repayment of necessary and reasonable expenses incurred by it in preventing property from perishing.

38. In argument, Mr Oosthuizen submitted that such a lien is inapplicable on the facts of this case: the lien contended for by the respondent is not of a debtor-and-creditor nature but of an enrichment (salvage) nature. Such a lien does not require any prior relationship between the parties; and the elements to be pleaded and proved by the claimant are well known.[5] Mr Oosthuizen relied on Steenkamp[6] for the proposition that the elements are incapable of satisfaction in this case: absent any agreement between the parties, there can be no claim for storage charges and thus no salvage lien. However, he acknowledged that the dispute in that regard does not fall to be determined by this court.

39. Mr Tshabalala's primary point in argument was that, in the circumstances of this case, the court should not exercise its discretion in favour of the applicant since doing so would prejudice the respondent: substitute security of the nature and order tendered by the applicant would be inadequate and indeed illusory since the costs and delays of litigation would render it financially unviable for the respondent to sue for payment of the storage charges. In other words, he submitted, granting this application would inevitably result in the release of the entrusted funds.

40. The submission is not without force. But Mr Tshabalala was unable to provide a convincing response to the 'flipside' concern that dismissing this application would leave the applicant with an election either to pay the respondent's disputed claim or to reconcile itself to an ever-escalating claim for storage charges coupled with reciprocal litigation burdens whilst its property remained in the plaintiff's possession in perpetuity or until the end of litigation.

41. In the exercise of my discretion, I am not minded to dismiss the application and precipitate such an election.
42. The residual question is thus whether the tendered security is adequate in substitution for the respondent's retention of the applicant's vehicle.
43. Mr Oosthuizen submitted that what is tendered as security is not trivial since it encompasses both the balance of the respondent's claim at February 2022 and further daily storage charges from that time to the date of this court's order. It would then be open to the respondent to claim from the applicant such amount as is considered its liability.
44. Mr Tshabalala's response was, in substance, to repeat the submission noted in paragraph 39 above.
45. I am satisfied that the tendered security is adequate in substitution for the respondent's retention of the applicant's vehicle. The amounts paid and to be entrusted secure the full quantum of the claim to the date of this judgment and order. It will be for the respondent to take advice and decide whether to institute and prosecute an action in respect of the claim.
46. It remains to address liability for the costs of this application.
47. The applicant seeks an order for costs on the attorney and client scale on the basis that the respondent's opposition to this application is unfounded and unmeritorious. According to the applicant, the respondent ought not to have caused the application to be initiated and conducted as an opposed motion.
48. By contrast, the respondent submits that the applicant was unreasonable in not paying what the parties had agreed or all-but-agreed in mid-February 2022. The application, if granted, would result in the release of the entrusted funds and have the effect of extinguishing the claim and should thus be dismissed with costs. At worst, the respondent did not oppose the application in bad faith and should not bear a punitive costs order.
49. It is regrettable that a narrow dispute over a modest amount escalated into full-blown opposed litigation. The papers disclose a degree of recalcitrance on both sides. However, the submission that the applicant needed to litigate to avoid a precedent that could embolden unscrupulous towors and/or repairers to impound vehicles unless and until their charges are paid by insurers or owners does not ring hollow. By contrast, the respondent's opposition to the application, including delays in giving notice of opposition and filing answering papers and submissions, is consistent with an unreasonable attempt to bring about grudging payment of disputed storage charges. It is appropriate therefore that costs should be borne on the attorney and client scale.
50. In the circumstances, I grant the following order:

50.1. The respondent is ordered to release a Volkswagen Polo Vivo motor vehicle bearing registration number CH47HVGP, VIN number AAVZZZ6SZDU0130129 and engine number CLS149483 (the vehicle) to the applicant's nominated representative within 24 hours of service of this order.

50.2. Should the respondent fail to comply with the order in paragraph 50.1 above, the sheriff or deputy is authorised and mandated forthwith to take possession of the vehicle wherever it may be found and to hand possession of the vehicle to the applicant's nominated representative.

50.3. It is recorded that the applicant has paid the sum of R31,464 (consisting of amounts of R26,220 and R5,244) to the respondent and the balance of the respondent's invoiced sum (being an amount of R12,236) into the applicant's attorneys' trust account.

50.4. The applicant shall pay further storage charges (calculated at R250 per day from 11 February 2022 until the date on which this order is granted) into the trust account of the applicant's attorneys, within 5 court days of service of this order, to be retained as security pending the final resolution of any legal proceedings that may be instituted by the respondent within 30 calendar days of service of this order to claim its alleged storage charges in respect of the vehicle.

50.5. Should the respondent fail to institute legal proceedings as contemplated in paragraph 50.4 above, the amounts paid into the trust account of the applicant's attorneys shall be released to the applicant.

50.6. The respondent is ordered to pay the costs of this application on the attorney and client scale.

PEARSE AJ

This judgment is handed down electronically by uploading it to the file of this matter on CaseLines. It will also be emailed to the parties or their legal representatives. The date of delivery of this judgment is deemed to be 15 June 2023.

Counsel for Applicant: Pieter Oosthuizen Instructed By: Pierre Krynauw Attorneys Counsel for Respondent: Nkateko Tshabalala Instructed By: Macbeth Incorporated Date of Hearing: 29 May 2023 Date of Judgment: 15 June 2023

[1] Prayer 3 records that the applicant has paid the sum of R31,464 (R26,200 plus 5,244) to the respondent and the balance of the invoiced amount (R12,236) into its attorneys' trust account.

[2] Hochmetals Africa (Pty) Ltd v Otavi Mining Co (Pty) Ltd 1968

(1) SA 571 (A) 582B-G

[3] Spitz v Kesting 1923 WLD 45 49; see too Mancisco & Sons CC (in liquidation) v Stone 2011

(1) SA 168 (W) 174H-I

[4] Mancisco supra 175E-176H

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

(3) SA 264 (A)

[6] Steenkamp v Bradbury's Commercial Auto Body CC (2882/2019)

[2020] ZALMPPHC 9 (23 January 2020) [15]-19]; see too Thor Shipping and Transport SA (Pty) Ltd v Sunset Beach Trading 208 CC 2017 JDR 1771 (KZP) [28]

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