

SOUTH AFRICA / JUDGMENT

Santam Limited v T K T Towing (PTY) Ltd (22/2151) [2022] ZAGPJHC 850 (31 October 2022) [2022] ZAGPJHC 850

COURT

South Gauteng High Court, Johannesburg

BEFORE

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CASE / FILE NUMBER

22/2151

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IN

**THE HIGH COURT OF SOUTH AFRICA,
(GAUTENG
DIVISION, JOHANNESBURG)****Case****No.: 22/2151**

REPORTABLE:

NO
OF
INTEREST TO OTHER JUDGES: NO
REVISED.
In

the matter between:

SANTAM
LIMITED
(Reg.
No.:
1918/001680/06)
Applicant
and
T
K T TOWING (PTY) LTD
(Reg.
No.: 2020/804774/07)
Respondent

JUDGMENT

HANDED DOWN ELECTRONICALLY BY CIRCULATION

TO THE PARTIES AND/OR LEGAL REPRESENTATIVES BY EMAIL, AND

BY UPLOADING ONTO CASELINES

DATE AND TIME FOR HAND-DOWN IS DEEMED TO HAVE BEEN ON:

31 OCTOBER 2022

CONSTANTINIDES AJ:

1. This is an application where the Applicant seeks the following order:

““1. The Respondent is ordered to release an Ford Figo motor vehicle with registration letters and numbers [...], VIN number [...] and Engine number [...] (“the motor vehicle”).

2. In the event of the Respondent failing, alternatively refusing to comply with the order in paragraph 1 above, the sheriff is authorised

to take possession of the vehicle wherever it may be found and to forthwith hand possession of the vehicle to the Applicant’s

nominated representative.

3. The Applicant having made payment to the Respondent in the amount of R8 250.00 and the balance of the Respondent’s invoice,

being an amount of R36 650.00 having been paid into the Applicant’s attorneys trust account, shall pay the further storage charges (calculated at R500.00 per day from 21 December 2021 until the date upon which this order is granted) into the trust

account of the Applicant’s attorneys within 5 (five) days of the service of this order to be retained as security pending the final resolution of any legal proceedings to be instituted by the respondent within 30 (thirty) calendar days of the service of this order to claim its alleged fees for the towing, storage, recovery, administration and security in respect of the vehicle.

4. Should the Respondent fail to institute legal proceedings contemplated in paragraph 3 above within 30 (thirty) days after the service of this order, the amount paid into the trust account of the Applicant’s attorneys shall be released to the applicant.
5. The Respondent is ordered to pay the costs of this application on the attorneys and client scale.
6. That such further and/or alternative relief as the honourable Court deems meet be granted to the Applicant.”

2. In the joint practice note it was stated that the issues for determination are :

8.1 ...whether the Respondent is a bona fide possessor of the motor vehicle and is entitled to retain the motor vehicle based on a lien.

8.2 .. Whether in the court's discretion the Applicant has tendered adequate security when it paid a sum of R36 650.00 Thirty Six Thousand Six Hundred and Fifty Rand into its attorneys of record's trust account.

8.3 The Court is called upon by the Applicant to apply its discretion and to substitute the security held by the Applicant's Attorneys of record in the form and manner proposed by the Applicant's in its Notice of Motion.

8.4 The Respondent place reliance on the Agreement concluded between the driver of the vehicle and the representative of the Respondent at the scene of the accident on the 17th October 2021 and as such claim a jus retentionis over the vehicle and contend that it is not obliged to restore possession to the owner, unless it has been paid what is due for the work done upon improvement of the res.

8.5 The Respondent further contend that it is trite that a lien may be defeated by the tendering of security for payment of the debt secured by the lien. The Respondent did not agree to the security tendered by the Applicant as the amount does not equate to the payment of services rendered, and the Applicant's tender is attempting to avoid settling the actual fees charged by the Respondent for their services.

3. The Respondent has tendered release of the motor vehicle upon payment of the services rendered. According to the Respondent the balance in the amount of R181 850.00 is due and payable by the Applicant.

4. The Applicant has stated that the Respondent represented to the driver of the vehicle that they were authorised by the Applicant to tow the vehicle and that they would deal with the Applicant directly.[1]

5. The Respondent states in the Answering Affidavit that the driver

agreed that the motor vehicle be towed and signed the towing slip and denies that the Respondent misrepresented itself to the driver as alleged.

6. According to the Respondent's Affidavit, the Applicant has placed in issue the fees and charges of the Respondent and denies its liability to make payment thereof.[2]

7. The Respondent has stated that the costs are clearly set out in the Agreement which the driver of the vehicle signed.

8. In a letter dated the 21st December 2021 the Applicant's Attorney states the following:

“ ...

3. We acknowledge receipt of the tax invoice referred to above attached hereto with annexure “A”. In terms of the aforementioned tax invoice, the total release fee amounts to R44 900.00.
4. Please note that our client disputes that the amount of R44 900.00 is due and payable to yourselves. After careful consideration of towing, security, admin and storage fees to be charged in terms of industry norms, our client is of the view that an amount of R8 250.00 constitutes a fair and reasonable amount.
5. In the premises, our client offers to pay the amount R8 250.00 to release the vehicle to our client. Attached hereto as annexure “B” proof of payment into your account. Attached as annexure “C” a breakdown of the charges that our client paid. Our client is further prepared to set security for the balance of your alleged claim. We request that, in light of the foregoing, that the vehicle be released immediately.
6. We hereby further inform you that we hold 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 a reasonable charge. (We furthermore confirm that we hold the balance of (R36 650.00) on trust as security pending institution of an action by you within 30 (thirty) days for payment of whatever the amount you believe are owing).

...

9.Should we not hear from you by close of business on 23 December 2021, we will assume that you have no intention of reconsidering the matter and will then approach the court for urgent relief and costs.”[3]
9. The Respondent states that it was given a mandate by the driver of the motor vehicle to tow the motor vehicle from the accident scene. The Respondent states that the Applicant tried to dictate how the Respondent charges for its service costs and unilaterally made a payment of R8 250.00 into the Respondent’s bank account without prior agreement or negotiation in regard to the aforesaid.
10. The Respondent claims a lien over the motor vehicle until it is compensated fully for the services rendered. According to the Respondent, as at the 24th May 2022, the service charges have increased to R181 850.00 and are increasing on a daily basis.
11. It is evident that the Applicant as at the 25th October 2021 was aware of the fact that the vehicle was at the premises of the Respondent and the following email dated 20th November 2021 was addressed to the Respondent:

“Good day. The following vehicle is standing at your premises and needs to be uplifted.

Would you please be so kind as to process an invoice for the release fee in order for the vehicle to be collected as a matter of urgency.

Vehicle make and model – FORD FIGO 1.5 AMBIENTE (5 DR) ...

Please send through invoice before 10H00 as Authorisation from Insurance is needed before payment can be made.

NB :

Please note that Santam does not generally pay for security or admin fees, so please ensure they do not appear on the invoice as line.....”[4]

12. The aforesaid email was responded to on the 26th October 2021 referring to an attached invoice for payment.[5]
13. The Applicant persists that there was misrepresentation by the Respondent’s employee that they were authorised to tow vehicles on behalf of the Applicant despite the fact that the aforesaid was not an authorised service provider of the Applicant.
14. The Applicant in the reply states the following:
“3.2 It has been shown, and in fact is now common cause between the parties, that the respondent made use of unscrupulous business practices to secure the tow of the vehicle as it represented to the driver that it was authorised by the applicant to tow the vehicle whilst in fact it never had any authorisation.”[6]
15. The Applicant persists that had the Respondent been an authorised service provider of the Applicant, it would have only been allowed to charge certain fixed rates and the Applicant would have been in a position to dictate to the Respondent what it was allowed to charge.
16. The Applicant alleges that the Respondent is not in lawful possession of the vehicle and has obtained possession of the vehicle “... by means of underhand tactics,”[7]
17. It was stated by the Applicant in argument that the Court does not have to deal with the merits in this matter but is merely to order the immediate release of the vehicle upon provision of security by the Applicant.
18. The Applicant’s legal representative stated that there is no valid reason in law to refuse the release of the motor vehicle that is being claimed by the Applicant.
19. The Applicant’s stated that on the 21st December 2021 it tried to negotiate the return of the motor vehicle without success.
20. The Applicant merely seeks the Court to exercise its discretion and to substitute the security held by the Respondent in the form and manner proposed by the Applicants in its Notice of Motion.[8] The Applicant furthermore seeks a punitive costs order on the scale as between attorney and client scale due to the fact that the

Respondents allegedly have forced the hand of the Applicant in circumstances where this matter should have been resolved on an

unopposed basis.

21. The Applicant's legal representative in argument from the bar tried to amend his Notice of Motion by making an alternative claim to the furnishing of security for costs by stating that instead of security being furnished by payment into the Trust Account of the Applicant's Attorneys, that the Court order the release of the motor vehicle after the relevant Bank Guarantee in the same amount as the monies placed in the Applicant's attorney's trust account be provided by the Applicant.
22. There was no formal application to amend the Notice of Motion launched before the Court, therefore, the aforesaid motion to amend the Notice of Motion stands to be rejected.

THE LAW

23. The Applicant in its Heads of Argument referred to the case of Hochmetals Africa Limited v. Otavi Mining Company (Pty) Ltd [1968][9] The aforesaid case makes it clear that relief is granted, not as of right, but as a matter of discretion. (emphasis added) There is no indication in the Applicant's papers that the motor vehicle has been damaged and/or is being

stripped. Had this been a valid concern, the Applicant would not have left this matter to the eleventh hour to launch the present

application. No explanation is rendered in the papers as to why the Applicant did not proceed to launch an application as stated in its letter dated 21 December 2021 addressed .to the Respondent

In the unreported case of Firststrand Bank Limited t/a Wesbank vs Abandoned Solutions SA (proprietary) limited case no: 2019/31586 in this division wherein the Applicant brought an application against the Respondent seeking delivery of a motor vehicle in respect of which the Respondent claimed it had a lien and for other relief. The Applicant tendered a guarantee as substitute security. Lamont J stated:

"[5] The owner of property subject to a right of retention by another is entitled to furnish adequate security for payment of the debt and as against the furnishing of that security to release of the security held.

- [6] See for example Spitz v Kesting 1923 (W) LD 45; Hochmetals Africa (Proprietary) Limited v Otavi Mining Co. (Proprietary) Limited 1968
- (1) SA 571 (A) at 582 C – F; Pheiffer v Van Wyk and Others 2015
- (5) SA 464 SCA at 20 and 21; Myers v Gearbox Centre (Proprietary) Limited 1977 (4) SA 11 (W) at 15 A.
- [7] The guarantee furnished by the applicant, guarantees the full amount of the respondent's claim, including further storage costs as per judgment being granted. (emphasis added)
- [8] It is my view that the substitute security tendered is adequate and that the applicant is entitled to delivery of the vehicle. (emphasis added)

24. Had the Applicant furnished a guarantee for the full amount of the Respondent's claim and any further storage costs as per any future judgment granted then it would have been entitled to the delivery of the vehicle. However, this matter is distinguishable from the aforesaid matter as the Applicant basis the claim and tender for money due and owing on its own calculations and not on the claim of the Respondent. Whilst the Applicant is partially on the right track as to the tender including the intention "...to pay the further storage charges (calculated at R500.00 per day from 21 December 2021 until the date upon which this order is granted", no formal guarantee was made to the Respondent for the full amount of the respondents claim including further storage costs as per any future judgment to be granted, but attempts to cap the tender of storage costs to the date of this court's judgment.

25. In terms of Rule 6(5)(g) of the Uniform Rules of Court the following is stated:

"Where an application cannot properly be decided on affidavit the court may dismiss the application or make such order as it deems fit with a view to ensuring a just and expeditious decision. In particular, but without affecting the generality of the foregoing, it may direct that oral evidence be heard on specified issues with a view to resolving any dispute of fact and to that end may order any deponent to appear personally or grant leave for such deponent or any other person to be subpoenaed and to be examined and cross-examined as a witness or it may refer the matter to trial with appropriate directions as to pleadings or definition of issues, or otherwise. ...

The Supreme Court of Appeal has cautioned that a Court should be astute to prevent an abuse of its process in such a situation by an unscrupulous litigant intent only on delay or a litigant intent on a fishing expedition to ascertain whether there might be a defence without there being any credible reason to believe that there is one."[10]

26. It has been said that the Court must take a "robust, common-sense approach" to a dispute on motion and not hesitate to decide an issue on Affidavit merely because it may be difficult to do so. This approach must, however, be adopted with caution and the court should not be tempted to settle disputes of fact solely on the probabilities emerging from the affidavits without giving due consideration to the advantages of viva voce evidence[11]

"As a general rule, decisions of fact cannot properly be founded on a consideration of the probabilities unless the Court is satisfied that there is no real and genuine dispute on the facts in question, or that the one party's allegations are so far-fetched or so clearly untenable or so palpably implausible so as to warrant their rejection merely on the papers, or that viva voce evidence would not disturb the balance of probabilities appearing from the affidavits."[12]

27. There appear to be fundamental disputes of fact which may not be able to be resolved on these papers such as amongst others the issue that the Respondent's employee misrepresented to the driver of the

motor vehicle that the company was an authorised service provider of the Applicant, .and the computation of the service charges of the Respondent .

28. The Applicant should have realized when launching this application that a series of disputes of fact, incapable of resolution on the papers were bound to arise.[13]
29. When this matter was argued before the Court, the parties had not had sight of a proper guarantee made to the Respondent and more particularly just a letter stating that security would be given in the form of an amount that had been placed in trust with the Attorney of the Applicant. Despite Counsel in argument from the bar stating
- that the Applicant could make provision for a bank guarantee, however, regrettably the aforesaid was not a guarantee for the full
- amount claimed by the Respondent Had a proper tender been made accompanied by a proper bank guarantee covering the full amount
- claimed by the Respondent including further costs as found in any future judgement granted then it would have been entitled to the delivery of the vehicle. There would have been no reason why the Respondent should not have considered and/or accepted a guarantee
- formulated as aforesaid.
30. Despite the fact that an invoice in the amount of R18 500.00 was sent by the Respondent to the Applicant on the 26th October 2021, the aforesaid was disputed by the Applicant and not paid.
31. According to the Respondent, the Applicant is male fide in stating that “adequate security has been tendered.” It is argued by the Applicant that R44 900.00 is inadequate security. Furthermore it was argued that the driver of the vehicle would need to give oral evidence in regard to what was stated between the Respondent’s tow truck driver and herself before she signed the Agreement.
32. The Respondent has stated that the Applicant, despite having been informed a day after the accident on the 26th October 2021 that they were in possession of the vehicle and was furthermore advised that the invoice dated the 3rd February 2022 which was attached to a letter to the Applicants reflects a balance of R92 750.00 and the vehicle would not be released unless payment of the Respondent’s services rendered was made, the Applicant did nothing to finalise this account.
33. It is trite that loss of possession destroys a lien and the lien cannot be revived by recovery of possession and the Respondent has quoted the applicable law and stated that:[14]
34. In the case of Brooklyn House Furnishers (Pty) Limited v. Knoetze and Sons 1970 (3) SA 264 (A) the Court held that:
- “A possessor who in terms of a agreement with a third party, obtains possession of a thing for improvement or custody, does not obtain possession in an unlawful manner and, if he takes care of or improves the thing for the benefit of the owner, he satisfies the requirement for the coming into existence of a right of retention against the owner.”[15]*

35. In terms of Rule 6(5)(g) of the Uniform Rules of Court the following is stated:

The Supreme Court of Appeal has cautioned that a Court should be astute to prevent an abuse of its process in such a situation by an unscrupulous litigant intent only on delay or a litigant intent on a fishing expedition to ascertain whether there might be a defence without there being any credible reason to believe that there is one.”[16]

36. It has been said that the Court must take a “robust, common-sense approach” to a dispute on motion and not hesitate to decide an issue on Affidavit merely because it may be difficult to do so.[17]

37. The facts show that:

37.1 the Respondent has possession of the motor vehicle and

37.2 the expenses incurred have been quantified in invoices that whether they were necessary or justified would have to be determined at a proper hearing in due course.

38. It is common cause that the Applicant was informed immediately that the Respondent had custody of the motor vehicle. However, the Applicant placed the charges rendered by the Respondent in issue. Albeit that the Applicant has placed the Respondent’s authority as a service provider is disputed by the Applicant.

39. The Respondent persists in the claim that it holds a valid salvage lien and will not release the motor vehicle to the Respondent without payment of the service costs.

40. According to the Respondent the refusal to accept the tendered security in the amount of R36 650.00 on the 21st December 2021 from the Applicant in substitution of the Respondent’s salvage lien, is due to the fact that, the amount tendered as security did not equate to services rendered by the Respondent.

41. The Respondent also submits that the payment of the Applicant in the amount of R8 250.00 to the Respondents for services rendered were an attempt to avoid settling the actual fees charged by the Respondent

for their services.

42. The Respondent also seeks an order that the application be dismissed with costs on the attorney and client scale. However no case was made out in argument or on the papers for punitive costs.

43. Furthermore the Respondent launched a Counterclaim in its answering affidavit. Same was opposed by the Applicant. The counterclaim does not comply with the procedures or Rules of Court and was therefore not entertained by the court.

44. In this application, there appear to be fundamental disputes of fact which cannot be resolved on the papers.

45. The Applicant should have realised when launching the application that a series of disputes of fact, incapable of resolution on the papers were bound to arise.[18]
46. The Applicant should have realized when launching this application that a series of disputes of fact in regard to the merits incapable of resolution on the papers were bound to arise.[19]
47. In regard to whether the Applicant has provided sufficient security for the release of the motor vehicle the court has exercised its judicial discretion and has come to the conclusion that the form and amount of security tendered by the Applicant is wholly insufficient and therefore it would not be in the interests of justice to order

the Respondent to release of the motor vehicle to the Applicant without the tender of adequate security. The court has detailed what would have been deemed to be sufficient security to ensure that the applicant would be entitled to release of the motor vehicle.

48. Due to the material disputes of fact relating to the computation of the Respondent's charges and the services rendered and whether the Respondent had misrepresented to the driver of the motor vehicle that it had authority to render towing and related services to the Applicant, this matter cannot be decided on the motion papers. The Applicant has not made out a proper case for the relief it seeks on the papers.
49. The general rule in matters of costs is that the successful party should be given his costs and this should not be departed from except where there are good grounds for doing so.[20]

I accordingly make the following order:

This application is dismissed with costs.

H CONSTANTINIDES

Acting Judge of the High Court

Gauteng Division

Pretoria

JOHANNESBURG

Matter heard on:

Monday the 24th October 2022

Judgment

handed down on: 31 October 2022

Attorneys for the Applicant

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- [1] Founding Affidavit, paragraph 8.6 read with paragraph 27 of the Answering Affidavit. (005-9 CaseLines) Founding Affidavit – (002-5 CaseLines)
- [2] Founding Affidavit, paragraph 11 – (002-6 CaseLines)
- [3] Annexure “FA9” to the Founding Affidavit. (002-29 and 002-30 CaseLines)
- [4] eMail dated 25 October 2021 (005-20 to 005-21 CaseLines)
- [5] eMail dated 26 October 2021 (005-19 CaseLines)
- [6] (Paragraph 3.2 of the Applicant’s Replying Affidavit - 006-6 CaseLines)
- [7] (Paragraph 9,3 of the Applicant’s Replying Affidavit - 006-8 to 006-9 CaseLines)
- [8] 4.4 of the Applicant’s Heads of Argument - (008-3 CaseLines)
- [9] [1968] to ALL SA 153 (A) – parallel citation: 1968 (1) SA 571 (A)
- [10] Minister of Land Affairs and Agriculture v D&F Wevell Trust 20008 (2) SA 184 (SCA) at 205 B-C
- [11] Soffiati
- v. Mould 1956 (4) SA 150 (E) at 154 F;
- [12] Service 11, [2019] Superior Court Practice Vol 2. D1-74
- [13] Room Hire C (Pty) Ltd v. Jeppe Street Mansions (Pty) Ltd 1949 (3) SA (3) SA 1155 (T) at 1162 and 1168; Adbro Investment Co Ltd v. Minister of Interior 1956 (3) SA 345 (A) at 350A; Standard Bank of SA Ltd v. Neugarten 1987 (3) SA 695 (W) at 699 A; Tamarillo (Pty) Ltd v. B N Aitken (Pty) Ltd 1982 (1) SA 398 (A) at 430 G – 431 A; Gounder v. Top Spec Investments (Pty) Ltd [2008] ZASCA 52; 2008
- (5) SA 151 (SCA) at 154 B – C. See: Erasmus-Superior Court Practice Vol. 2 D1 – 76. [Service11-2019]
- [14] Respondent’s Heads of Argument; Steenkamp
- v. Bradburys Commercial Auto Body CC (2882/2019) (2020) ZACMPPHC9 (23 January 2020 at paragraph 8.

[14] Respondent's Heads of Argument;

Steenkamp

v. Bradburys Commercial Auto Body CC (2882/2019) (2020) ZACMPPHC9 (23 January 2020 at paragraph 8.

[15] Respondent's Heads of Argument, paragraph 23 (008-10 to 008-11 of CaseLines)' Absa Bank v. Cornelius and Another 67427/2011 (2013) ZAGPPHC 15 (1 February 2013) at paragraph 20

[15] Respondent's Heads of Argument, paragraph 23 (008-10 to 008-11 of CaseLines)'

Absa Bank v. Cornelius and Another 67427/2011 (2013) ZAGPPHC 15 (1 February 2013) at paragraph 20

[16] Minister of Land Affairs and Agriculture v D&F Wevell Trust 20008 (2) SA 184 (SCA) at 205 B-C

[17] Soffiati

v. Mould 1956 (4) SA 150 (E) at 154 F;

[18] Room Hire Co (Pty) Ltd v. Jeppe Street Mansions (Pty) Ltd 1949 (3) SA 1155 (T) at 1162 and 1168

[19] Room Hire C (Pty) Ltd v. Jeppe Street Mansions (Pty) Ltd 1949 (3) SA (3) SA 1155 (T) at 1162 and 1168; Adbro Investment Co Ltd v. Minister of Interior 1956 (3) SA 345 (A) at 350A; Standard Bank of SA Ltd v. Neugarten 1987 (3) SA 695 (W) at 699 A; Tamarillo (Pty) Ltd v. B N Aitken (Pty) Ltd 1982 (1) SA 398 (A) at 430 G – 431 A; Gounder v. Top Spec Investments (Pty) Ltd [2008] ZASCA 52; 2008

(5) SA 151 (SCA) at 154 B – C. See: Erasmus-Superior Court Practice Vol. 2 D1 – 76. [Service11-2019]

[20] See: Superior Court Practice Vol. 2 [Service 13-2020] D5 – 7.

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