REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA, HELD AT SOUTH GAUTENG HIGH COURT, JOHANNESBURG

REPORTABLE: [redacted] / NO

OF INTEREST TO OTHER JUDGES: [redacted] /NO

REVISED

26/9/16

CASE NO. 45 455/13

In the matter between:

TRADEMORE (PTY) LTD **APPLICANT**

and

ZAM ZAM LOGISTICS CC **RESPONDENT**

JUDGMENT

REYNEKE AJ

Introduction

[1] In the commercial world of road freight carriers and consignors it is common trade to enter into a specific written contract containing carefully designed terms. The parties before me did not follow that safe route. Although it is common cause that they entered into a road carrier agreement, the terms of payment are in dispute. The respondent transported goods on behalf of the applicant and consequently, in securing payment, claimed a lien. The applicant, in terms of the *Rei Vindicatio*, is seeking an order with the following terms:

(a) Directing the respondent to do all things necessary to immediately make available for collection 2760 bags of cotton oil cake (weighing approximately 136 tonne) by the applicant and/or its nominee(s);
(b) Directing the respondent to advise the applicant of the address of the premises where the 2720 bags are available for collection;
(c) Authorizing the applicant and/or its nominee(s) to enter the premises to collect the 2720 bags with the assistance of the Sheriff of the court and/or the South African Police Service;
(d) Directing the respondent to pay the costs of this application on an attorney and client scale, alternatively directing the respondent's attorneys to pay the costs hereof *de bonis propriss.*

Summary of facts

[2] Mr Tayob is the sole member of the respondent. An entity, Bay City Trading CC (Bay City), also represented by Tayob, rendered road transport services to the applicant in September 2012. (The "September 2012 contract".) A dispute arose regarding the invoices rendered by Bay City. The parties as a result of this dispute decided not to deal with each other again. The dispute remains unsolved.

[3] On 18 October 2013, despite this bad blood amongst the parties, an employee of the applicant entered into an agreement with the respondent to upload, transport and deliver four truckloads of a raw material named cotton oil cake from Zimbabwe to a destination in South Africa. The consignment was to be delivered by 29 October 2013. The respondent, instead of delivering the load ("the goods") at the end destination kept it in storage at another facility, the location unknown to the applicant and as yet never disclosed.

[4] The dispute regarding the September 2012 invoices was kindled again. On 31 October 2013 the respondent's attorney send a letter to the applicant, demanding immediate payment of the amount of R192 162,20. This amount includes the figures of the September 2013 contract. It is stated in the letter that a lien is exercised until the whole amount has been paid.

[5] Tayob, on behalf of the respondent, states that he is claiming a lien over the goods for:

(a) The payment of the freight of other goods as per the September 2012 contract;
(b) The payment of standing cost charges in respect of the other goods;
(c) The payment of the freight of the goods as per the October 2013 contract;
(d) The charges incurred for the off-load of the goods;
(e) The storage costs of the goods, at a charge of R5 000 per day to be calculated from 29 October 2013 till date of final payment; and
(f) The costs to be incurred for the clean -up after the storage exercise, which is valued at R21 000.

[6] Tayob states in particular that the applicant still owes Bay City R145 000 in regards to the September 2012 contract, therefore he retained three truckloads of cotton oil cake ("the goods") transported in terms of the October 2013 contract as security for payment.

[7] Numerous negotiations followed in an attempt to settle the old disputes and to have the goods released.

[8] The applicant denies that any payment in respect of the October 2013 contract is due and payable, for breach of contract.

Disputes

[9] The following are in dispute:

(a) The existence of a written agreement;

(b) The terms of payment; and

(b) Whether there was a lien.

[10] The applicant submits that no invoice was presented; that the duty to pay only arises fourteen days after receipt of the invoice. The respondent in turn denies any knowledge about a written agreement and in particular the existence of the fourteen-day-payment term. The respondent contends that delivery and payment is contemporaneous.

The agreement

[11] The purported written agreement is attached to the applicant's founding affidavit. It is in the form of an a transport order or instruction to the respondent, describing the goods, the tonnage, address for collection, instruction that the delivery address will be advised at the border, the price and a line that reads: 'PAYMENTS: 14 Days after the receipt of original invoice and P.O.D'.

[12] The applicant states that the document was faxed to the respondent. I note that there is nothing printed on this document, referring to the time when it was sent or the numbers to or wherefrom it was sent, as would normally be the case when a document was sent by facsimile. Except for the allegation under oath that it was sent, there is no other proof of sending or delivery. The respondent states that the document is a fabrication or, conversely, a document that might have been in existence, but it was never received by him. The respondent denies that there was ever an express agreement on payment but that there was a general understanding that payment was due upon respondent furnishing the applicant with a proof of delivery of the loads, which respondent did contemporaneously or within a day of delivery.

[13] It seems that there is a factual dispute regarding the terms of payment. In the one hand there is evidence about a written agreement, albeit that an oral agreement concluded over the phone was later confirmed by the contents of the written order. In the other hand the express agreement on the terms of payment is denied, with a reliance on the general practise in the past.

[14] The practise in the past is illustrated by the respondent with reference to two invoices. There is evidence that a truckload was delivered at Randfontein on 3 October 2013, the invoice was rendered on 7 October 2013 and payment was made on 18 October 2013. A second consignment was delivered at Middelburg on 3 October 2013. It is common cause

that this invoice was presented shortly thereafter, although the precise date is unknown. Payment was made on 25 October 2013, after successful negotiations regarding the due amount.

[15] I will follow a robust, common-sense approach in order to decide this issue on affidavit. I refer to the well-known matter of *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd 1984 (3) SA 623 (A)* where the court clarified and qualified the formulation of the general rule where in proceedings on notice of motion disputes of fact have arisen on the affidavits. The general rule was stated in *Stellenbosch Farmers' Winery Ltd v Stellenvale Winery (Pty) Ltd 1957 (4) SA 234 (C) at 235E – G* to be:

'... where there is a dispute as to the facts a final interdict should only be granted in notice of motion proceedings if the facts as stated by the respondents together with the admitted facts in the applicant's affidavits justify such an order... Where it is clear that facts, though not formally admitted, cannot be denied, they must be regarded as admitted."

[16] The court in *Pluscon-Evans* qualified the general rule by adding:

'In certain instances the denial by respondent of a fact alleged by the applicant may not be such as to raise a real, genuine or *bona fide* dispute of fact (see in this regard *Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd* 1949 (3) SA 1155 (T) at 1163 - 5; *Da Mata v Otto NO* 1972 (3) SA 858.)'

[17] I am not convinced that these two illustrations show a general practise of contemporaneous payment. The undisputed facts regarding the practise followed on two previous occasions rather support the evidence on behalf of the applicant. I accept the evidence by the applicant, that payment was only due 14 days after receipt of invoice.

The lien and the law

[19] Our law acknowledges debtor and creditor liens. (*Brooklyn House Furnishers (Pty) Ltd v Knoetze & Sons 1970 (3) SA 264 A at 270).*

[20] 'Retention (or lien) is the lawful detention by a person of a thing in his possession for the payment or restitution of a debt, costs, or expenses, and by it a person provides for his own indemnity until he acquires what is due to him in regard to the same thing.' (SH Barber, and WA Macfyden, *Simon van Leeuwen's Cencura Forensis, 1 4 37 8.)* This right is

enjoyed by carriers in regard to the things carried, for the recovery of the carriage and expenses which they have incurred.

[21] 'The carrier's lien can only be exercised in respect of the freight due on the specific goods and cannot be exercised in regards to other amounts which may be owing between the owner and the carrier.' (Joubert, *The Law of South Africa, Second Edition, (2) 1* at 332 par 611; Conradie, *Carriage of Goods* at 85.) This contention is supported by the authorities as cited in the para 20. Also see *Anderson & Co v Pienaar & Co 1922 TPD 435* at 438: 'If, therefore, some sum is due in respect of cartage, then there was a lien for a certain amount..... '.

[22] The carrier is well entitled to rent premises in order to store the goods in exercising the lien and to hold on until the storage costs has been paid. *(Anderson, at 439; Joubert, The Law of South Africa at 332, para 611).*

The lien claimed for the payment of the freight of other goods in respect of the September 2012 contract

[23] Tayob repeatedly stated that he is relying on a lien in security of outstanding payments in regards to both the September 2012- and the October 2013 contracts. The respondent's heads of argument state that even if the October 2013 invoices were to be ignored on account of there being a dispute as to the date of payment, the respondent validly exercises a lien for the other invoices, they not being subject to the caveat of delivery against payment. The respondent's stand was changed during argument. It was then contended that the lien was only in regards to the October 2013 contract. Tayob's answering affidavit does not support this change in argument.

[24] It is clear that the lien cannot be valid over charges owing in regards to the September 2012 contract, as the attached goods were not the subject matter in 2013.

The lien claimed for payment of standing cost charges in respect of the September 2012 contract

[25] The applicant in its reply states that the issue of standing time is irrelevant to the determination of this application. In the light of the contents of para 4.7.1.12 of the respondent's answering affidavit, where a lien is claimed for standing cost charges in

respect of the September 2012 agreement this aspect needs to be addressed. I do not need to make a finding on the existence of such a practise, or whether an amount for standing time charges is owing or payable, as it is clear that there is no valid lien on the goods in regards to any charges occurred in connection with the 2012 freight.

The lien claimed for payment of the freight of the goods in terms of the October 2013 contract

[26] This issue is whether the respondent was entitled to exercise a lien over the goods for payment of the freight of the said goods *at that point in time.* Unless there has been a contrary agreement between the parties, the obligation to pay the freight arises when the goods are delivered. *(Standard Bank v Wilman Spilhaus & Co (1888) 6 SC 15.)* This is precisely the argument for the respondent.

[27] For reasons as stated above (paras 11-17) I have accepted that there was an agreement that payment has to be made fourteen days after presenting of the invoice. Despite the carrier's readiness to deliver in good order, the duty to pay had not yet arisen as the original invoice was not presented. The respondent exercised his potential remedy prematurely. I find that there was no lien in regards to the October 2013 contract.

[28] In the absence of a valid claim for a lien, the charges incurred for the off-load of the goods; the storage costs of the goods, and the costs for the clean -up after the storage exercise, need not to be addressed.

Disposal of the goods

[29] I turn to the new facts that were introduced by way of a further affidavit by the respondent, with permission of the court.

[30] I deem it necessary to give a brief description of the goods, as described by the applicant. Cotton oil cake is a perishable raw material being used to enrich animal feed. This specific cotton oil cake was produced in early October 2013. In winter it can be stored under ideal conditions for approximately six months. In summer the shelf-life will decrease due to various factors. The rate at which it became rancid increased in summer, with the result that it can no longer be used as it will cause decease and death in cattle. There is also

a chance that the cotton oil cake may be infested with weevils, a kind of insect. Cotton oil cake should be used within three months of production thereof.

[31] On 12 December 2012 the applicant brought an urgent application with the same prayers as in this application, but the application was struck from the roll for lack of urgency.

[32] The respondent in his affidavit dated 9 December 2013, indicated that he has a facility where the goods would have a shelf life of six months. At that stage he averred that the product is easily capable of being stored for one year under the conditions he presently have it stored. He had based this contention on advice, but failed to attach a confirmative affidavit from the advisor. Yet, as early as 11 February 2014 the respondent's attorney wrote a letter to effect that the goods were causing a nuisance due to them attracting rodents and insects and due to an offensive odour. The respondent then threatened to get rid of the goods. The respondent now, on the day of the hearing of the motion, avers that it is impossible to deliver the goods as it was contaminated and disposed of.

[33] The applicant still insists on an order to deliver, arguing that it is not clear in which manner the goods were disposed of; whether it was destroyed, sold, given away, or thrown away. As the applicant may still be in a position to obtain possession this is not a futile exercise. The respondent is silent on the above, not giving any detail as to when, where and how the disposal was done. I have to consider the possibility that if the goods are not completely destroyed, there is a possibility, however slight it may be, that the applicant may and should where possible, limit its damages.

Cost

[34] The applicant is seeking a special cost order on a scale of attorney and client, or in the alternative an order that the respondent's attorneys must pay the costs *de bonis propriss.* The applicant argued that the conduct by a party in litigation which has the effect of being vexatious, even if it is not intended to be vexatious, may deserve a punitive cost order. (*In re Alluvial Creek Ltd 1929 CPD532 at 535*).

[35] In a letter dated 8 November 2013 the respondent's attorney indicated that the sum of R145 550 was owing, excluding storage and offloading costs. The quantum of the storage and offloading costs were in dispute. In para 7 it is stated that upon receipt of the aforesaid

figure in the attorney's trust account, the goods would be released. The applicant arranged for a bank guarantee for the said amount despite the request that the figure should be paid into the attorney's trust account.

[36] The documents indicate that the amount of R145 550 is applicable to the September 2012 invoices only. It was clearly contemplated that the figure of R145 550 was for payment of the other goods.

[37] Security was arranged in the form of a bank guarantee in the amount of R145 550 and tendered. The respondent however, insisted on actual payment of the figure and suggested that the security may be tendered for the storage and offloading costs. The respondent persisted with its refusal to release the cotton oil cake.

[38] In *Anderson* (*supra*) at 438 it was confirmed that an owner of goods who is confronted with a claim for a lien is entitled to his goods on giving his security. However, it could not have been the intention that the guarantee for R145 550 should serve as security for payment in regards to the October 2013 contract.

[39] I find nothing vexatious in the above conduct.

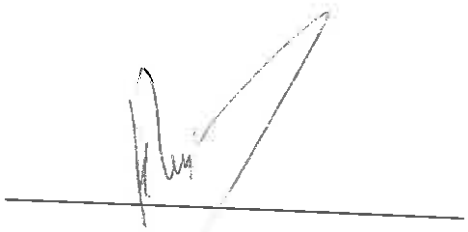
[40] The fact that the goods were in fact eventually spoiled, in itself, does not substantiate a special order in this proceedings. I find no substance in the request for a special cost order.

ORDER

1. The respondent is directed to advise the applicant of the address of the premises where the 2720 bags of cotton oilcake, or whatever is left and/ or not destroyed, are being kept.

2. The respondent is directed to do all things necessary to immediately make available for collection 2720 bags of cotton oil cake, or whatever is left and/or not destroyed.

3. The respondent is to pay the costs of this application.



C. REYNEKE

ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

Counsel for the Applicant/ Plaintiff: Adv. E Rudolph

Instructed by: Witz, Padayachee and Isakow Attorneys

Counsel for the Respondent/ Defendant: Adv. Ali

Instructed by: Gani & Koor Attorneys

Date of Hearing: 20 May 2014

Date of Judgment: 26 May 2014