REPUBLIC OF SOUTH AFRICA

NORTH GAUTENG HIGH COURT
PRETORIA

1/2/2013

CASE NO: 67427/2011

(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.

1 FEBRUARY 2013
DATE

SIGNATURE

In the matter between:

ABSA BANK LIMITED Applicant

and

CORNELIUS JOHANNES JACOB STORM First Respondent

JOHN MORRISON PANELBEATERS AND SPRAYPAINTERS CC Second Respondent

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J U D G M E N T

TEFFO, J:

INTRODUCTION

[1] This is an application for an order directing the second respondent to:

1.1 return possession of a TOYOTA YARIS T1 5 DR with engine number 2NZ4333828 chassis number JTDKW923605046714, registration letters and numbers VKX 048 GP (hereinafter referred to as "*the vehicle*") to the applicant against:

1.1.1 payment in the amount of R36 229,50 plus VAT, in favour of the second respondent;

1.1.2 delivery of a banker's guarantee to the second respondent to the value of R10 000,00 plus VAT for the storage fees charged by the second respondent which will become due and owing once the second respondent has proved its claim in a competent court of law;

1.2 institute an action against the applicant within 30 days of delivery of the vehicle to the applicant, failing which the aforesaid guarantee shall lapse.

[2] The basis of this application is the following:

2.1 The first respondent purchased the vehicle from the applicant in terms of an instalment sale agreement ("*the agreement*"). In terms of the agreement ownership of the vehicle would at all times remain vested in the applicant until such time as the first respondent had paid the full amount owing to the applicant;

2.2 The applicant alleges that the first respondent has breached the terms of the agreement in that he failed to make regular payments thereon, alienated the asset and also failed to keep the vehicle insured, alternatively he failed to prevent the lapsing of the insurance over the vehicle;

2.3 When the first respondent defaulted with his contractual obligations towards the applicant, it came to the knowledge of the applicant that the vehicle was in the possession of the second respondent;

2.4 Enquiries were made and the second respondent provided the applicant with an invoice dated 7 September 2011 in terms of which the second respondent claims the amount of R36 229,50 for the repairs done on the vehicle and storage costs to the value of R10 000,00;

2.5 The second respondent's right to possession of the vehicle is based on a *lien*;

2.6 The applicant tenders to pay the second respondent's costs for the repairs done on the vehicle.

[3] On or about 2 November 2010 and at Johannesburg, the first respondent represented by Shauwn Lynch ("*Lynch*") and the second

respondent represented by Alberto Jorge Da Fonseca Faria ("*Faria*") entered into a partly written and partly oral agreement the terms of which were the following:

3.1 The second respondent would attend to the repairs and paint works of the vehicle at an agreed cost of R36 229,50 ("*the repair costs*");

3.2 Should the second respondent be required to store the vehicle a storage fee of R250,00 per day, would be levied;

3.3 The second respondent would provide a Toyota Tazz motor vehicle with registration letters and numbers PSH 301 GP, as a courtesy vehicle ("*the courtesy vehicle*");

3.4 The vehicle would serve as security for any money that may become payable to the second respondent in respect of the courtesy vehicle, including R5 000,00 to cover any accident damage or theft of the courtesy vehicle, which amount is subject to change, R250,00 valet charge and all other liabilities that may arise as a result of traffic violations, negligence or otherwise; and

3.5 The vehicle shall be detained by the second respondent until the courtesy vehicle has been returned to it and all amounts due to it have been paid in full.

[4] After the second respondent had complied with all its obligations in terms of the agreement somewhere in February 2011 Faria contacted Lynch telephonically informing him that the vehicle was ready for collection.

[5] Lynch informed him that the vehicle had been impounded and was detained at Sinovale Police Station, Pretoria.

[6] Faria referred Lynch to the terms of the agreement between the second and first respondent to the effect that the second respondent would not release the vehicle until the repair costs have been paid in full, the courtesy vehicle had been returned to it and all costs in respect of the courtesy vehicle, including R5 000,00 excess, valet costs and additional damage related costs had been paid in full together with storage costs of R250,00 per day that would be levied in respect of the vehicle.

[7] The second respondent contends that it has been forced to store the vehicle to date of application, has levied storage charges since 1 March 2011 but it has not received payment in respect of the repair costs or the storage of the vehicle. According to it the amount due to it amounts to R124 979,50 calculated as follows:

Repair costs of vehicle as agreed	R 36 229,50
Storage costs of vehicle (from 1 March 2011 to 6 February 2012)	R 83 500,00
Excess in respect of courtesy vehicle (as agreed – subject to change)	R 5 000,00
Valet fee (as agreed)	R 250,00
TOTAL	R124 979,50

[8] At the hearing of this application the parties informed me that the courtesy vehicle has been released and returned to the second respondent.

[9] Counsel for the applicant conceded that the repair costs amount to R36 229,50 and not R35 311,40 as referred to in paragraph 1 of the Notice of Motion. An amendment of this paragraph was then applied for and it was accordingly granted. There was also an application for condonation of the late filing of the replying affidavit. The second respondent did not object to it and the application was also granted.

[10] The second respondent contends that the applicant has not tendered adequate security to substitute the vehicle.

[11] It further contends that it has a *lien* over the vehicle for the repair costs and storage fees. According to it the vehicle serves as security until the courtesy vehicle is returned to it and all the amounts due to it in respect of the courtesy vehicle have been settled.

[12] The second respondent also contends that the guarantee only makes provision for payment to be made to it should the applicant be ordered to do so. It does not provide for a situation where the second respondent obtains an order against the first respondent and/or Lynch. The guarantee does not also provide for legal costs or the payment of VAT.

[13] Its further contention is that it would be prejudiced in the extreme and its rights would be left unprotected should it be ordered to release the vehicle on any terms before the courtesy vehicle has been returned to its possession.

[14] The issue for determination is whether the security provided for by the applicant is adequate for the claim of the second respondent.

[15] In *Zeda Financing (Pty) Ltd v Du Toit t/a AMCO Diensstasie* 1992 (4) SA 157 (O) at 160I to 162D Wright J made the following remarks:

> *"According to Voet 16.2.21 security can be given to defeat a lien in certain circumstances. I quote from Gane's translation vol 3 at 172:*
>
> > *'But is one who has a right of retention held liable to restore the thing to his opponent whenever the latter tenders sound security for the refund of expenses or payment of wages? It appears that that ought to be left to the discretion of a circumspect Judge according as it shall have become clear from circumstances either that he who ought to restore is deliberately aiming at holding back possession of the thing too long under cover of expenses or wages; or on the other hand that the person owing the expenses has it in mind to recover the thing under security, and then by a lengthy and pettifogging protraction of the suit to make the following up of the expenses, wages and the like a difficult matter for his opponent."*

[16] Kroon J in *Peter Cooper & Company v De Vos* [1998] 2 All SA 237 (E) said the following:

> "*It is clear that Voet in his previous remarks on para 15 above as referred to in the judgment of Zeda Financing (Pty) Ltd v Du Toit t/a Amco Dienstasie as quoted by Wright J, only refers to security '... for the refund of expenses or the payment of wages', i.e. for the amount of the debt allegedly due to the lien-holder. For the purpose of calculating the amount of security to be lodged, the value of the property subject to the lien is therefore irrelevant (see National Industrial Credit Corporation Ltd v Meiring 1940 OPD 191).*"

[17] In *Spitz v Kesting* 1923 WLD 45 at 49 Tindall J articulated the position as follows:

> "*Even where the claim in respect of which the jus retentionis is asserted is made in good faith, the court has the power to order delivery to the owner against adequate security. Each case will depend on its particular facts and the court, in exercising its discretion, will have regard to what is equitable under all the circumstances bearing in mind that the owner should not be left out of his property unreasonably and on the other hand should not be given possession if his object is, after getting possession, to delay the claimant's recovery of expenses.*"

[18] At 503D-E in *Astralita Estates (Pty) Ltd v Rix* 1984 (1) SA 500 (C) the court remarked as follows:

> "*It is open to the court to order the return of the owner's property to him against the provision of sufficient security. The owner of the property, however, has no right to claim return of his property on this basis, i.e. against provision of security – the grant of this relief is a matter for the discretion of the court*" (see also *Hochmetals Africa (Pty) Ltd v Otavi Mining Co (Pty) Ltd* 1968 (1) SA 571 (A) at 582E, *Forfif (Pty) Ltd v Macbain* 1984 (3) SA 611 (W)).

[19] In *Brooklyn House Furnitures (Pty) Ltd v Knoetze and Sons* 1970 (3) SA 264 (A) the appellant sold certain furniture under a hire purchase agreement and one of the clauses in the agreement provided that the purchaser should not, without the seller's consent, cause the furniture to be stored subject to storage charges. The purchaser breached the agreement and entered into an agreement with the respondent in terms of which the respondent removed and stored the furniture.

[20] The respondent who *bona fide* believed that the purchaser was the owner, claimed a *lien* and refused to hand over the furniture unless compensation for the removal and storage was first paid. The court held that a possessor who in terms of an 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. The court accordingly held that the respondent was entitled to a *lien* against the appellant to retain possession of the furniture until he had been compensated for his necessary expenses.

[21] In the present matter the applicant as the owner of the vehicle in terms of an agreement with the first respondent, obtained a summary judgment against the first respondent for the return of the vehicle after the first respondent defaulted with his obligations in terms of the agreement. It came to the knowledge of the applicant that the vehicle was in the possession of the

second respondent. It is common cause between the parties that the first respondent took the vehicle to the second respondent for repairs. The second respondent repaired the vehicle and kept it to itself after the first respondent failed to pay its repair costs and additional costs incurred as agreed. It is also common cause that in terms of an agreement between the first and the second respondents there were also storage costs, the issue of the courtesy vehicle and costs incidental thereto in addition to the repair costs of the vehicle.

[22] When the applicant approached the second respondent for the vehicle, the second respondent claimed a *lien* on the vehicle and furnished the applicant with an invoice for the repairs done on the vehicle including the storage costs in the amount of R10 000,00.

[23] The applicant contends that the second respondent is not entitled to claim storage costs from it as the agreement relating to the storage costs was only between the first and the second respondents. On the other hand the second respondent contends that the *lien* it exercises over the vehicle includes the repair costs, storage costs and the fact that the vehicle serves as security until the courtesy vehicle is returned to it and all amounts due to it in respect of the courtesy vehicle have been settled. Accordingly the second respondent claims an amount of R124 979,50 which amount includes the repair costs, storage costs, excess in respect of the courtesy vehicle and the valet fee.

[24] The applicant tenders payment for the repair costs plus VAT together with the delivery of a banker's guarantee to the value of R10 000,00 plus VAT for the storage fees in dispute in its application for the return of the vehicle in question. The second respondent contends that the applicant's guarantee is wholly inadequate in the circumstances. Counsel for the second respondent referred to the matter of *Van Niekerk v Van der Berg* 1965 (2) SA 525 (A) and *Mancisco & Sons CC v Stone* 2001 (1) SA 168 at 176. He submitted that in *Van Niekerk v Van der Berg* the court held that a *lien* is a right of retention acquired over property by a party who has expended money in respect of the said property. Counsel argued that a *lien* may flow from a contract which covers all that is due to the creditor under the contract in respect of the work done and expenses incurred in respect of the property.

[25] The second respondent's counsel referred also to the matter of *Brooklyn House Furnishers (Pty) Ltd v Knoetze and Sons* where it was held that a *lien* claimed in the absence of an agreement, is restricted to useful expenses, that being expenses which add value to the property which include repair costs and on the other hand necessary expenses, those expenses without which the article would perish and include storage fees. Counsel submitted that in respect of the adequacy of security the court is asked to destroy the "*undoubted right to possession*" by substituting same for something else.

[26] His further submissions were that the court must seriously consider all contentions raised by the lien holder. Further that the court will not make an

order which diminishes the right of retention, thus by ordering security to be provided for less than the amount of the lien holder's claim (*Mancisco & Sons CC v Stone supra*).

[27] I agree that the starting point in this matter is that an owner does not have an automatic right to demand delivery of his property upon tender of adequate security. It is within the court's discretion to order delivery of property to the owner against adequate security.

[28] The facts in the present matter are different to the facts in the *Brooklyn House* matter in that the applicant in the present matter argues that its tender and guarantee are based on the invoice that it got from the second respondent. Now the second respondent has increased the amount of the storage costs and it is relying on the issue of the courtesy vehicle which it was not part of. The second respondent concedes that the invoice was provided by it to the applicant's representative, Mr Scheepers, on the understanding that the amount was going to be settled at the time and time was of the essence. Realising that the applicant did not settle the amount, it cancelled the agreement between it and Scheepers. Although the applicant denies the agreement between Scheepers and the second respondent it is interesting to note that now the second respondent's claim also includes the costs incurred in respect of the courtesy vehicle.

[29] From the papers it is clear that the issue of the courtesy vehicle is between the first and the second respondents. It is also clear that as early as

February 2011 the second respondent had finished repairing the vehicle. According to Faria, a representative of the second respondent, the first respondent was unable to fetch the vehicle at the time because the courtesy vehicle was impounded by the Sinovale Police. Since then the second respondent kept the vehicle and now the courtesy vehicle has been released and returned to the second respondent in November 2012. The invoice in terms of which the applicant prepared the tender and guarantee is dated 7 September 2011. Had the first respondent managed to obtain the vehicle as early as February 2011, the matter could not have reached this level and this could have diminished the costs. Surely I cannot find justice in the fact that the applicant's ownership over the vehicle should be withheld on the issues surrounding the courtesy vehicle, (*Peter Cooper & Co v De Vos supra),* should this be allowed, it would be tantamount to depriving the owner of its property unreasonably (*Spitz v Kesting supra*).

[30] The contention by the second respondent that at the time the invoice dated 7 September 2011 was furnished to the applicant it thought that cash was going to be paid to settle the claim is therefore rejected for the reasons advanced above.

[31] The same applies to the second respondent's contention that the guarantee does not provide for a situation where it obtains an order against the first respondent and/or Lynch. This argument is without merit as the applicant is not a party to the agreement between the first and second respondents and/or Lynch.

[32] As to the contention that the application should fail because the guarantee does not provide for legal costs, it does not always follow in this kind of an application that security should include the legal costs. Each case will depend on its particular facts, and the court in exercising its discretion will have regard to what is equitable under all the circumstances bearing in mind that the owner should not be left out of its property unreasonably and on the other hand should not be given possession if his objective is, after getting possession he would delay the claimant's recovery of expenses. For the reasons advanced in para [28] above I cannot find any reason why the issue of legal costs should be a bar to the granting of this application. In the circumstances it is my view that the inclusion or non-inclusion of the legal costs in the guarantee is not a requirement for adequate security.

[33] I agree with counsel for the second respondent that the guarantee should include VAT to accord with the prayers in the notice of motion.

[34] In my view the security furnished is in substitution of the *lien*. The second respondent is therefore not entitled to any more security than that provided by the *lien*. Accordingly the guarantee constitutes adequate security and removes any prejudice that might otherwise be suffered by the second respondent.

[35] This application must therefore succeed.

[36] In the result I make the following order:

36.1 The application is granted with costs.

36.2 The applicant is ordered to correct the guarantee and make provision for the amount tendered to include VAT to accord with prayer 1 of the Notice of Motion.

M J TEFFO
JUDGE OF THE NORTH GAUTENG
HIGH COURT, PRETORIA

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